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THE FOUNDATIONS OF THE AUTHORITY OF INTERNATIONAL LAW AND THE PROBLEM OF ENFORCEMENT¹

THE subject of this paper is generally regarded as one of the most difficult in the whole field of international law and relations—a fact of which the author is only too conscious. Even if space permitted anything in the nature of a systematic exposition, an international lawyer taken up largely with day-to-day affairs may justifiably be thought to lack the necessary qualifications for such a task.

Nevertheless, things occur from time to time, or situations develop, that make it desirable for the practising international lawyer to devote some attention to the theory and fundamentals of his system, and in particular to the question of its basic authority. Such a situation exists in the world today, for international law is being subjected to great strains and stresses, and a number of disruptive tendencies are at work, tending to impair its authority.

Now, to the practitioner, the question of the authority of a legal system, whether municipal or international, presents itself largely as a question of enforcement. A rule or a system has authority if it is enforceable, and normally will be enforced. Otherwise it has, or may have, comparatively little authority—or if it nevertheless does have it, such authority must derive from other sources. At this point it is necessary to draw attention to an important distinction—one frequently overlooked or blurred—between two concepts, namely, that of the *binding* character of a rule or system of law, and that of its *authority*—a term here used in the sense of prestige. To ask what it is that makes a rule binding, or from what its obligatory character arises, is not the same thing as to ask what it is that gives the rule its authority, though there is a connection that will be noticed later. The distinction is readily seen in regard to the question of enforcement itself. It appears sometimes to be supposed that rules of law are binding if, and because, they are enforceable. This view is clearly

¹ This paper was originally delivered as a Public Lecture at King's College, University of London on March 17, 1955.

incorrect: indeed, it is the reverse of correct. The law is not binding because it is enforced: it is enforced because it is already binding. Enforcement presupposes the existence of a legal obligation incumbent on those concerned. The prospect of enforcement is in fact little more than a factor or motive inclining people to obey rules that they are in any case under an obligation to obey: but it is not itself the source of the obligation.

On the other hand, it is easy to see that the *authority* of a rule or system (using that term as denoting the sum of the factors that confer an adequate prestige on a rule or system of law) is very closely connected with the question of enforcement. From the practical point of view, almost as much importance attaches to the authority of a rule or system of law as to its binding character. It might be said that it is its binding character that creates for those concerned the obligation to obey the law, but that it is its authority that causes them to obey it in fact.

ENFORCEABILITY AND INTERNATIONAL LAW

With regard to the actual position concerning the enforceability of the international legal system, there has always been a respectable body of international lawyers that has both considered enforceability to be a necessary characteristic of any system of law, properly so called, and has also believed that international law possessed this characteristic, even if only in a rough and rudimentary form. Oppenheim, for instance, whose treatise may be cited because it constitutes so very much the practitioner's Bible, so to speak, begins by stating (8th ed., p. 8, § 3) that "a characteristic of rules of law is that they shall, if necessary, be enforced by external power." He then (*ibid.*, p. 10, § 5) defines law as

"a body of rules for human conduct within a community which, by common consent of this community, shall be enforced by external power."

In support of this dictum, Oppenheim cites Westlake and Travers Twiss. He then goes on to express the view that international law is a system that is both intended by States to be enforceable, and is actually enforceable, if necessary by a process of self-help on the part of States. Finally (*ibid.*, p. 14, § 9), he says that, subject to the provisions of such instruments as the Charter of the United Nations and the so-called Kellogg Pact of 1928, "war is the ultimate instrument for defending violated legal rights."

Nor are the writers of Oppenheim's generation alone in putting forward such a view. For instance, so great a modernist as Kelsen seems, in one of his latest works, *Principles of International Law*, published in 1952, to incline towards a similar view. He says, on p. 5 of this work, that

"... law is a coercive order. It provides for socially organised sanctions, and these can be clearly distinguished from a religious

order on the one hand and a merely moral order on the other hand. As a coercive order, the law is that specific social technique which consists in the attempt to bring about the desired social conduct of men through the threat of a measure of coercion which is to be taken in case of . . . legally wrong conduct."

Later, on p. 14 of the same work, Kelsen points out that in decentralised societies (and the international society is such a society), enforcement of the law is accomplished through the application of the principle of self-help. The legal order leaves the enforcement function to the individuals injured by a delict or illegality. He then says:

"Although in this case the individuals appear to 'take the law in their own hands,' they may nevertheless be considered as acting as organs of the community."

He continues:

"If the principle of self-help prevails . . . the function of these individuals is determined by the legal order. . . . If they employ force, they enforce the law."

Eventually—see particularly pp. 18–39 of the book—Kelsen appears to reach the conclusion that, judged by these tests, international law is true law because, broadly speaking, it provides sanctions, such as the adoption of reprisals, war, and the use of force generally, and makes the employment of these sanctions lawful as a counter-measure against a legal wrong, but unlawful in all other cases. This conclusion—that under international law acts of force of one kind or another constitute either an international delinquency, or else, if used as a counter-measure against a breach of international law, a permitted sanction—is of great significance for present purposes.

Without necessarily subscribing fully to all these views, it can fairly be said that up to a comparatively recent date, war, and the use of force generally, did constitute in some sense a recognised method of enforcing international law; or, more accurately, a means whereby in the last resort a dispute between States as to their rights could be settled. It was a means of settlement or enforcement analogous in the international field to the "blood feud" or "ordeal by battle" or single combat, by which, in a more primitive stage of national societies, disputes between individuals or groups were settled—and it has always been the case, and still is, that the international society tends to reflect national society at an earlier stage of development.

Nevertheless, this position in respect of war, and of the use of force generally, was both equivocal and paradoxical. War, or other hostilities or acts of force, strictly settled nothing but the question of superior strength. The victor in effect both determined the rights of the case and enforced these on the other side. Still more paradoxical was the position whereby international law, while

legalising and regulating war and the use of force, and indeed giving to these elements an essential position in the system as a whole, yet professed to be an instrument devoted to promoting peaceful and regular intercourse between States, and to be aiming at the elimination of war and force as legitimate operations. It is a little as if, in the national field, the death penalty was kept, but the hangman was punished after each execution—or at least visited with social ostracism. As Professor Brierly so aptly said in his little book on *The Outlook for International Law* (p. 21):

“To hold at one and the same time that States are bound to respect each other’s independence and rights, and yet are free to attack each other at will, is a logical impossibility.”

Yet, as he went on to say, that was what “the accepted international legal theory” required the international lawyer to hold.

This particular paradox no longer exists; but, in eliminating it, the international society has simultaneously created another. There is no need to retail the steps by which, in the period following on the first world war, up to date, war has, by a series of measures, been divested of its former basic legitimacy and has, on the contrary, been invested with a basic illegitimacy, except in certain classes of cases, which can be roughly summed up under the head of individual or collective self-defence or action against aggression, or breach of the peace, taken under, or consistently with, such an instrument as the Charter of the United Nations.

Now this is, of course, very well, and greatly to be welcomed: no one would wish it otherwise. But it has given rise to one curious and perhaps unforeseen consequence—for in so far as war, or the use of force, was a means, however crude, by which an injured State could assert or defend its legal rights, as the case might be—then the position now is that international law is less enforceable today than it ever has been in the whole of its history—for nothing definite or certain has been put in the place of force as a means of settlement.

Here Kelsen’s view may be recalled, that war is either an international sanction or an international delinquency. In the work cited above, he goes on to point out that the effect of recent instruments, such as the Charter of the United Nations—at any rate as he and many others interpret it—is to reduce the legitimate role of force to self-defence, and counter-action against aggression or breaches of the peace. But he makes no reference to one rather odd result of this, namely that whereas international law now forbids the use of force *except* as a counter-measure to an illegality, it by no means permits it in every case of illegality, but on the contrary, confines it to a very limited class of illegalities only. One might sum the matter up by saying that the provisions of the Charter of the United Nations relating to aggression, breach of the peace, and the threat or use of force—at any rate as they

are frequently interpreted—go far towards rendering *unenforceable* by direct action the whole of international law, *except* that one part of it that now prohibits resort to war or the use of force except in self-defence or to counter aggression.

If this is the position, then it must be asked how far the international society has, in respect of breaches of international law *generally*, provided any new sanction to take the place of the former sanctions which, however crude and unsatisfactory their operation, did in some sort exist. It is sometimes thought that the Charter of the United Nations provides such a substitute, or at any rate the beginnings of one, particularly by means of those provisions which enable collective action of a forcible kind to be taken against aggression or breach of the peace. But this involves a misconception as to the scope of these Charter provisions. It is not against law-breaking as such that they are directed, but against that particular type of law-breaking that takes the form of an act of aggression or of committing a breach of the peace. Now it is possible to violate a large part of international law in all sorts of different ways, and to commit breaches of treaties right and left, without ever having recourse to aggression or breaking the peace, or even threatening a breach of the peace.

The position just described has to be qualified in one important respect, but that qualification only serves to emphasise the difficulty. The Security Council has power under Article 39 of the Charter to determine the existence not only of an act of aggression or breach of the peace, but also of a threat to the peace, and to take consequential counter-action—and therefore if a violation of international law occurred of such a character as to constitute, or give rise to, such a threat, then, even if no one country was actually threatening another, the Council could act. But—and this is the point—under this same Article 39 and the rest of Chapter VII, it can only act in order to “maintain or restore international peace and security.” This is not the same thing as acting to settle the dispute as such, or to prevent or punish the actual violation of international law involved, though indirectly those results might in certain cases be achieved.

Under another Chapter—Chapter VI—of the Charter, the Security Council does have certain functions directed to bringing about the pacific settlement of disputes. But under this Chapter, these functions are not of an enforcement character. It is doubtful whether, on a proper reading of these functions, they enable the Council to do more than make *recommendations* with a view to the settlement of any dispute. Moreover, they are, in theory at least, subject to the same limitation, that the dispute or situation shall be one likely to endanger the maintenance of peace and security, which is frequently not the case where legal issues only are in question.

The Security Council also has certain functions in regard to the

International Court of Justice, to be mentioned in a moment. But subject to this point, it would be true to say that the role of the Security Council under the Charter is a specialised one. The matter could be summed up, broadly, in the statement that the Council is there primarily to maintain and enforce the peace, rather than to maintain and enforce the law.

Equally, the powers of the General Assembly of the United Nations—wide in the matter of inquiry and discussion—are virtually non-existent on the side of settlement and enforcement. They depend entirely on the voluntary co-operation of States, and can hardly be said to extend beyond the exercise of moral or political persuasion and pressure.

It must, therefore, be concluded that, as things are at present, neither of the main political organs of the United Nations can, in any but the most qualified sense, be regarded as an instrument for the enforcement of the legal rights of States, or the redress of legal wrongs generally.

THE INTERNATIONAL COURT OF JUSTICE

There is, however, another organ of the United Nations, of a different and specifically legal character, namely the International Court of Justice, which, potentially at least, can play a decisive part in the enforcement of international law. But the Court can only function with the consent of the parties to any particular dispute, given either *ad hoc* for the purposes of that dispute, or generally and in advance for all disputes, or for one or more classes of disputes, and with or without certain reservations.

To the extent that States do confer jurisdiction upon the Court or some other tribunal, the enforcement of international legal rights, and the redress of international legal wrongs, can be said to be, in practice, a reality, and perhaps the only reality of that kind at present contained in the international legal system. It may be objected that the difficulty is only removed a stage further back, for it is not enough for a court to adjudicate and give judgment—its decisions must also be carried out and, if necessary, imposed upon the parties; and it may be said that there is no guarantee that the decisions of the International Court, or other international tribunal, will be carried out in fact, and that there is no machinery for enforcing them if they are not. But while this would be correct in a sense, it would give a misleading picture of the position. The authority of a decision of the International Court is very great, and in practice it is extremely difficult for the parties not to accept, or to refuse to act in accordance with such a decision, or, indeed, the decision of any other international tribunal to which they have submitted their dispute. This is demonstrated by experience, for in all the fairly long history of international arbitration and adjudication, going back now perhaps 150 years, in the

course of which many cases have been submitted to international tribunals of all kinds, there have been very few instances in which the parties refused to accept the decision of the tribunal, or to act in accordance with it—so few indeed that these exceptional cases could almost be numbered on the fingers of one hand.

Nor is it altogether true now, so far as the International Court is concerned, to say that no machinery exists for enforcing its decisions. Article 94 of the United Nations Charter provides that if a party to a dispute fails to perform the obligations incumbent on it under a judgment rendered by the Court, the other party may have recourse to the Security Council—which is then empowered to “decide upon measures to be taken to give effect to the judgment.” Of course, this only goes part of the way, for the Security Council may fail to act, or its action may be ineffective. Still, it does constitute in some sort the beginnings of a mechanism for the enforcement of international law as such.

It can be concluded, therefore, that the process of adjudication or arbitration by international courts and tribunals, and in particular the International Court of Justice, offers a real way by which international law, and international rights and obligations generally, can find enforcement—a way of which greater use ought to be made. Judge Lauterpacht in his book *The Functions of Law in the International Community*, has expressed the view that States ought to regard themselves as being under a duty to submit disputes to adjudication; for if States are bound by international law, as they profess to be, they cannot at the same time set up to be final judges or arbiters of what that law is. Only courts can do that. But, in the international field, courts can only do it if they are allowed to. What then is the present position? It is not very satisfactory. Out of some 80 independent States in the world today (not all of them, of course, members of the United Nations), only about half have signed and ratified the so-called “Optional Clause” accepting the compulsory jurisdiction of the International Court at The Hague, and then often only with extensive reservations. During the ten years of its existence, this Court has had far fewer matters submitted or referred to it than did its predecessor, the Permanent Court, in the corresponding period from 1920–1930; and the number of matters that go to the International Court seems to be growing less. Nor does the United Nations itself seem particularly eager to use the Court. In ten years, the Assembly has only on nine occasions requested an Advisory Opinion from the International Court; and the Security Council not once. This compares unfavourably with the record of the League of Nations.

It would be interesting to speculate on the reasons for this state of affairs, but that would involve going too far afield.

PROBLEM OF THE BINDING FORCE OF INTERNATIONAL LAW

It must be concluded that although the international order may have made some attempt at progress in repressing or countering that particular type of illegality that consists in armed aggression or breach of the peace, it has not yet made much progress in the enforcement of international rights and obligations generally, or of international law as such. It now frowns on self-help, without, however, as yet having put anything in its place. It is obvious that such a situation is unsatisfactory. Fortunately, there can be set against it not only the fact that international law has never, in practice, been more than partly dependent for its authority on the possibility of its physical enforcement, but also the principle that no system of law depends, or can, in the last resort, depend for its authority solely on the chances of enforcement. If it did, it could never in practice be enforced. The assumed certainty of enforcement in the national society masks the fact that, in general, the law does not have to be enforced, not so much because it is taken for granted that it would be, but because it commands in practice the general assent or tolerance of the community.

The real foundation of the authority of international law resides similarly in the fact that the States making up the international society recognise it as binding upon them, and, moreover, as a system that *ipso facto* binds them as members of that society, irrespective of their individual wills.

But this is not the end of the matter. Just as in the national society the law would not command the assent of the individual unless it were felt to be binding precisely because, and for no other reason than that it was the law, so equally international law could derive no authority from its acceptance by States as binding, or States would not give that acceptance, unless it were felt by them to be in fact inherently binding. There is, however, this difference between the national and the international position: in the national society, the individual has, normally, no difficulty in accounting for his feeling that the law is binding on him—for instance, because it has been enacted by the proper authority; whereas it is less easy—in fact it is very difficult—in the international field, to say precisely what it is, in the ultimate and juridical sense, that makes international law a binding system that States have a duty to conform to, and which, moreover, makes that duty a legal and not merely a moral or social duty.

This is the problem that has engaged the attention of many learned jurists and great thinkers, and the literature of the subject is vast; but if one studies that literature even a little, it is difficult to avoid the impression that what is being pursued is a sort of will-o'-the-wisp, an *ignis fatuus* that only recedes further into the distance as one approaches it, and that can never actually be reached. Consider how the matter might present itself to a stranger in these fields of thought. He might begin with the convenient

and comfortable proposition, which has commended itself to many international lawyers, that the consent of States in one form or another, express or tacit, or merely by way of acquiescence, is the source of the validity of the rules of international law, in the sense of constituting what makes them binding. But further reflection would soon convince him that this cannot be so, and that while consent may determine the content, scope, and character of a given rule, and may be the means of bringing it into operation, it cannot *per se* be the reason why the rule is binding. As Verdross, Brierly and others have conclusively shown, it is not consent, as such, that creates the obligation, though it may be the occasion of it. It is a *method* of creating rules, but it is not, in the last resort, the element that makes the rules binding, when created. In short, consent could not, in itself, create obligations unless there were already in existence a rule of law according to which consent had just that effect. Another way of putting it is to say that it is because international law already makes consent a source of obligation that obligations can arise from consent. Others have put it in the following way: "There is a customary rule of international law that the consent of the States to a rule makes that rule binding upon them." Be it so; but then, of course, the difficulty is merely removed a stage further back, and the inquirer will have to ask what is the juridical foundation for this customary rule itself, and what is it that makes *that* rule binding. To this question it is very difficult to give an answer, or at any rate a final answer. It can be said, with Kelsen, that the reason why a customary rule is binding is that there is an antecedent and still more fundamental legal principle to the effect that "States have a duty to go on behaving as they have customarily behaved"—but then what is the source of *that* duty? Or it can be held, with Lauterpacht, that the antecedent principle that confers binding force on customary rules is one according to which the general will of the community must prevail, and there is a duty to conform to that will as expressed in customary rules of law—but here again a duty is postulated that has itself, in the legal sense, to be accounted for. The point is that, however the matter is put, finality can, in the nature of the case, never be attained. The discussion merely enters what is known to the mathematicians as an infinite regress—a series in which each proposition is explicable in terms of the previous one, and derives its validity from it; but this antecedent proposition itself requires to be accounted for by a similar process.

The foregoing circumstances suggest a few simple reflections for which no originality is claimed, but which may be helpful to those international lawyers who, like the present writer, cannot spend a great deal of time on analytical investigation, and must take things rather as they find them.

In the first place, the problem of the ultimate foundation of

the binding character of law is in no way peculiar to international law. It is a general legal problem, and arises just as much with regard to national law as it does for international law. No better illustration of this could be given than the one which is to be found in Salmond's *Jurisprudence*. A man is told he cannot ride a bicycle along a certain footpath. He asks why, and is told because it is forbidden by a certain by-law. He asks what is the authority for the by-law, and is told that it is made under an Act of Parliament. But if he asks what is the authority for the Act of Parliament, and what is the source of the rule that Acts of Parliament have the force of law, there is, and can be, no final answer. As Salmond says, no Statute can confer this authority on Parliament, for that would be to assume the power that has to be accounted for. Whence would that Statute itself derive its validity? No doubt the legal force of Acts of Parliament derives from the Constitution, written or unwritten. But then it must be asked what is it that gives the Constitution legal force? In some countries the Constitution has itself been enacted: but what gave that enactment validity? If those who enacted it had the legal as distinct merely from the physical, power to do so, whence did they derive it, what is the rule of law that conferred the power on them, and whence did it derive its validity? And so on. Ultimately there can be no answer, or there can only be a series of answers, no one of which can be absolutely final.

The reason why the difficulty is less obtrusive in the national than in the international field, is that in the national field the interim terms in the series afford a sufficiently satisfying practical basis for the obligatory force of the law to make the average person feel it unnecessary to go further—for instance, it is usually enough that the law has been enacted by the proper method, without inquiring what it is that confers legal force on enactment by that particular method. In the international field, however, there are no interim terms of quite the same kind. The absence of any patent and obvious source of obligation, such as might exist if there were an international legislature, deprives the international jurist of any manifest point at which he can rest, and which he can regard as a satisfactory terminal point beyond which there is no practical necessity to go.

In such a position as this, the international lawyer might well take a leaf out of the mathematician's book when the latter is faced with an infinite regress. One mathematical pronouncement on the subject² is to this effect: that when the object of any search begins to recede in the repetitive fashion of a regress

“you may rest assured that you are battering against a boundary of possible human knowledge—a boundary which manifests itself in that form.”

² J. W. Dunne, *Nothing Dies*, p. 32.

The mathematician knows that, if this is the position, no useful purpose will be served, nor will any additional knowledge be gained, by going beyond the first and second, or, at most, the third term of the series; for with the third term, the regress is invariably entered. The international lawyer would be justified in adopting the same view. For those who favour the *consent* theory, for instance, there would be little practical object in going beyond the proposition that there is an overriding principle of customary international law, not itself deriving from consent, but having the consequence that the general consent of States to a rule, once given or shown to exist, makes that rule binding on each State, irrespective of its subsequent wishes. For those who see in law the hallmark of *society*—the maxim *ubi societas ibi jus*—and who consequently postulate the necessity for the existence of law in any society, there would be no need to go beyond a proposition to the effect that if law is a necessity of the international (or any other) order, this implies that the law must be binding, or it cannot serve its purpose. If law is *necessary*, that necessity must lie precisely in the need for *obligatory* rules as between members of a society, and it would involve an inherent contradiction to propound law as necessary, if it was not also necessarily binding. This way of putting the matter has considerable attractions.

Still further assistance can be derived from the mathematicians, because all mathematics are founded ultimately on a set of irreducible axioms and postulates that are not themselves capable of *mathematical* proof. They must either be assumed or find their justification in some non-mathematical field.³

It needs but little reflection to see that in precisely the same way, juridical science must also rest upon ultimate foundations that are themselves incapable of *juridical* demonstration, for it is really self-evident that a thing cannot be proved in terms of itself. For this reason, certain jurists, such as Triepel, have urged that the ultimate foundation of any system of law must always lie in some non-juristic field. This point is, in a sense, elementary—yet it is so important to the whole subject that it must be insisted upon. The principle involved can be stated as follows: a *juridical* answer to the question why any rule of law is binding, presupposes the existence of a fully fledged juridical system in terms of which that answer can be given. Thus, to ask this question, not as regards a *particular* rule of law, but with reference to the concept of law *itself*, is necessarily fruitless, for unless law already exists and is valid, no juridical answer to the question can be given; while if law does already exist and is valid, no answer is necessary. In order to give *legal* reasons why law is valid and binding, it is necessary to assume the validity and obligatory character of law, or the legal reasons will themselves have no juridical force. Thus

³ Cf. the various mathematical systems founded on non-Euclidean premises invented by Lobachevski, Bolyai, Riemann, Minkovski and others.

the argument is necessarily in a circle, and those who want to discover the ultimate reason for the validity of such a proposition as, for instance, that "law must be obeyed," have to look beyond law in order to do so, and must find the answer in some non-judicial ground or field.

Evidently it is tempting, though perhaps not strictly necessary, to do this, and many have done so. The ultimate source of legal obligation has been sought in all kinds of fields such as in the necessities of society, in what might be called the inherent reason of the thing, in the moral or religious order, in what is known as natural law, and so on.

The issue was raised in two striking sermons delivered in the Temple Church in January and February, 1955, on the occasion of the anniversary of the execution of King Charles I.⁴ The theme was the same one that so much agitated the men of the Jacobean period—the question whether authority is derived from above (the "divine right" theory), or conferred by consent from below. Whatever the answer to this question may be, as regards the process of *government*, there can be no doubt in which direction the considerations reviewed in this paper lead, as regards the *law*—for law is revealed as something that has no meaning unless it is external to the will of the members of the society in which it functions, as something to which those members are subject, and which derives its obligatory character from sources that do not rest on consent, but rather themselves confer on consent its law-making capacities.

And the ultimate source of the validity of this law is and must be extra-legal. Of the various possible ultimate but non-legal sources of the validity of the law, the most satisfactory may well lie in a concept very close to that of law, though not itself specifically judicial—namely that of justice. In a paper read by the present writer to the Grotius Society in 1952,⁵ some observations were made about justice, that may be recalled here. Broadly, they were to the effect that while everyone was agreed that there was a concept known as the concept of justice, there were many different views about what was just in practice, and that the attempt to do justice, rather than to apply the law impartially, was liable to lead, in the long run, to injustice. Law aimed at ultimate justice, but achieved it indirectly, by methods the immediate object of which was not so much justice as such, but order, stability, certainty, and the elimination of that subjective element that cannot fail to enter into any attempt to apply justice directly, and which often vitiates it.

But is it not possible to go further, and say that the concept of justice itself requires the application of law, and that if law aims at ultimate justice, justice for its part requires first and foremost, that the law shall be obeyed—for without obedience to the law,

⁴ The preacher was Canon Firth, Master of the Temple.

⁵ *Transactions*, Vol. 38, 1952, at p. 145.

there can in the long run be no justice? The point is well made in a passage from McIver's *The Modern State*:

“We obey the law not because we necessarily think that the law is just, but because we believe it to be just to obey the law.”

It is this precept that seems to provide the firmest ground for the affirmation that the law, national or international, is binding; and the most fundamental, and therefore ultimately the most compelling, reason for its authority.

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MODERN REAL PROPERTY

ENGLISH land law has been unfortunate in its textbooks. It has given us a vocabulary and a language which, however distasteful it may be to the superficial, is unsurpassed in the world of law as a vehicle for precise thought. In that language have been written learned volumes on conveyancing, some brilliant monographs on specific topics, much valuable history and too much pseudo-history. But where is its Pollock, its Anson, its Salmond? Not since Littleton has there been a serious attempt to isolate its principles from their historic origins, to examine them as living contributions to contemporary thought, and to apply them in the construction of a systematic analysis of the whole field which would satisfy the demands of scientific jurisprudence and prove worthy of the greatest system of property law that the world has ever known.

Since 1925 the literature of land law has been dominated by Cheshire's *Real Property*, a book on which every teacher relies and to which every serious student turns for information and enlightenment. It has now reached its seventh edition,¹ and the new edition is very different from its predecessors. There has been much rewriting and much new material has been incorporated, including an eighty-page appendix on the Rent Acts by Mr. J. B. Butterworth. These changes alone deserve detailed consideration, but they are overshadowed in importance by the radical rearrangement of the basic material, reflecting a fundamental revolution in the author's attitude to the subject as a whole. This emphasis on approach suggests that the time has come to examine the place of Cheshire in the literature of the law, and in particular to attempt an assessment of its relation to that ideal systematic analysis of land law which was indicated in the previous paragraph.

Much can be learnt of a book's basic philosophy from a study of its table of contents. On that test alone, all previous editions of Cheshire—brilliant as they were in exposition—are revealed as little more than commentaries upon section 1 of the Law of Property Act, 1925. That section, with its list of legal estates and interests, was held out as the foundation of modern land law, and that list was used as the key to its exposition. No doubt this was inevitable in a book first written in 1924, when the still undigested mass of the 1925 legislation overshadowed every discussion on land law. But from the start there were difficulties—one thinks of the way in which restrictive covenants were to be bandied about in successive editions between Terms of Years and Easements, finally coming

¹ *The Modern Law of Real Property*, 7th ed., by G. C. Cheshire, D.C.L., F.B.A. With an Appendix on the Rent Acts by J. B. Butterworth, M.A. London: Butterworth & Co. (Publishers), Ltd., 1954, lxi and 899 and (index) 54 pp.

to an uneasy rest in a separate chapter of their own—which might have suggested that section 1 is an uncertain guide to basic principles. Nowadays we are slowly beginning to realise that section 1, and indeed the bulk of the 1925 legislation, neither represents, nor indeed materially affects, those basic principles; at best it is a series of ingenious devices for unravelling the “ungodly jumble” into which the conveyancers had got themselves, while at worst—with its life tenants masquerading as tenants in fee, and its trusts for sale where no sale is intended—it is the apotheosis of the legal fiction. But between the first edition of 1925 and the seventh of 1954 nearly thirty years have passed; and one wonders what harm has been done to the study of land law by this misplaced emphasis on the incidental.

All this has now gone. A great step forward has been taken. Substantive interests in land are now arranged on a classification which can claim to be valid in itself and to be independent of the accident of legislation—“the distinction between family interests arising under a settlement or a trust for sale and what, for want of a better title, are called “commercial interests,” *i.e.*, interests such as leaseholds, mortgages and easements, that arise in the ordinary routine of business and for the most part are not inevitable parts of family endowment schemes” (p. 107). While welcoming the recognition of the need for juristic analysis, we must make two observations on the analysis itself. In the first place, Dr. Cheshire bases his distinction on the “belief that what may perhaps be called the classic law of real property was built up round the family settlement.” Historically speaking, this is of course very largely true. But it cannot be emphasised too strongly that historical causes alone are inadequate grounds for a scientific classification of existing legal phenomena. No doubt there are still some rules and practices which appear to have history alone as their warrant; in such cases each observer must decide for himself whether the rule or practice should be discarded as obsolete, or whether the fault lies in the observer’s inability to understand its full implications. But why risk the charge of obsolescence by relying exclusively on history—as here it might be argued that as the classic family settlement is dead so a system based upon it is therefore out of date—when perfectly sound contemporary reasons can be found for its justification? History should suggest classifications and systems, but it must not be allowed to dominate them.

Dr. Cheshire’s classification seems to be derived from a distinction made some years ago between beneficial and commercial ownership. That distinction was the result of an attempt to analyse the function rather than the nature of ownership, though in turn it suggested a classification of interests, implicit in the 1925 legislation, into commercial and non-commercial interests; thus, as a result of the abolition of the lease for life at a rent, one may say that the life interest is not generally a commercial

interest, whereas the fee simple is. This secondary distinction based on function is obviously not entirely satisfactory, though it does serve to emphasise that in relation to the beneficial functions of ownership the 1925 division into legal and equitable interests is of no importance as a basis of classification. Unfortunately, Dr. Cheshire has introduced a third division, which he calls Absolute Ownership, and he equates this Absolute Ownership to the Fee Simple Absolute in Possession. This is surely quite indefensible. It immediately breaks down when consideration is given to the fee simple vested in a trustee, for whatever meaning may be attached to absolute ownership the interest of a trustee must clearly be excluded from it. A more serious charge is that this third division cuts right across the foundation of the two others, family interests and commercial interests. These two divisions are derived from an analysis of the function of ownership, whereas absolute ownership brings us directly and inescapably into the problem of the nature of ownership. Dr. Cheshire's full classification is thus not consistent with itself, and we hope he will reconsider it.

In any event, the classification into Family Interests and Commercial Interests, or Commercial and Non-commercial interests, or Commercial Ownership and Beneficial Ownership, is of no more than secondary importance. Every system of land law—every system of property law—must stand or fall by its treatment of the basic problems of ownership, possession and incumbrances. For this reason Williams on *Real Property*, as edited by Cyprian Williams—the best of the pre-1926 books, and still indispensable for the study of modern land law—opens with a discussion on the Nature of Property and Ownership. Dr. Cheshire, on the other hand, uses throughout his book phrases such as “absolute ownership” and “true owner” but nowhere does he explain their meaning, or attempt to associate them with the technical fabric of English land law. What is more, after reading those parts of the book which impinge most closely on the problem of ownership, one is left with the uneasy suspicion that Dr. Cheshire has deliberately avoided the problem itself, and that this has led him into difficulties and ambiguities which even interrupt the clarity of his exposition, let alone obscure the foundations of his system.

The problem of ownership of land is closely, though not exclusively, linked with the doctrine of estates. Dr. Cheshire deals with this doctrine in his Introductory Book, and deals with it adequately, though historically, and inevitably briefly. Yet once he passes from the Introductory Book to his exposition of modern law he at once jettisons this learning as outmoded and barbaric. “We may safely brave the wrath of the purist and describe a fee simple tenant as an absolute owner of the land. It is an affectation to dispute the fact.”² Unfortunately, the law compels us not

² pp. 114-115.

merely to dispute the fact but to deny it quite bluntly. Apart from the trustee-tenant, to whom we have already referred, there is the inescapable fact of the disseisor who, if he has disseised a freeholder, is himself tenant in fee simple.

Of much more significance, however, are the juristic implications of Dr. Cheshire's sweeping statement. English land law has made no contribution to the legal theory of ownership more striking, more brilliant and of more permanent value than the separation of the land from the estate in the land. That this separation has resulted in an unparalleled plasticity within the sphere of "limited ownership"—of "family interests" and even, as regards the term of years, of "commercial interests"—is well known, and Dr. Cheshire draws attention to this consequence in its appropriate place. What seems to be less appreciated is that this separation necessarily implies a penetrating analysis of the fundamental conception of ownership itself—of *dominium* and of the fee simple as the nearest equivalent to *dominium* in English land law. By distinguishing the land from the estate, English land law has shown conclusively that even within a society as individualistic and as legalistic as England in the nineteenth century, ownership is not a necessary legal concept. The problem of ownership remains, but it is not a legal problem; it is the concern of the politician, the economist, the sociologist, the moralist, the psychologist—of any and every specialist who can contribute his grain to the common heap. Ultimately the philosopher will try to unify this shifting mass into a coherent whole. That he has failed in the past to achieve an acceptable synthesis is not to be wondered at, for the mass is constantly changing from age to age, perhaps even from year to year. The lawyer, naturally, has his contribution to make, but as the problem is not even fundamentally a legal problem, the final solution does not lie with him. He is concerned with ownership only insofar as it produces consequences within the sphere of his own special technique, roughly indicated by the ideas of legal rights and legal duties. The sum total of those legal rights and duties which inhere at any one time in any one possessor—or tenant—of land is his estate, but whether the possessor is also the owner, in the wider field of philosophy, cannot be determined by the lawyer or by the art which he practises, for the estate, even the fee simple, does not give the complete data necessary for the formulation, let alone the solution, of the ultimate problem. This isolation of the legal problem, crystallised out in the estate, has also, for the lawyer, solved the problem of continuity and permanence in an ever-changing society. The content of the estate may vary with the centuries—the legal rights and duties of today may differ in detail and in emphasis from those of yesterday—but the estate itself remains unaltered. Thus it is that the estate has been able to satisfy the legal needs of a feudal society as fully as those of the age of reason, of the

sentimental liberalism of the nineteenth century as of the amoral decadence of the Welfare State. This is no mean feat; it may well indeed be the supreme achievement of western thought in the sphere of property law. Yet this it is that Dr. Cheshire discards in a single sentence. He prefers to throw back the experience of centuries into the shifting sands of ownership.

We think we can guess why. The jurists of the nineteenth century ignored English land law; it was outside their Roman, continental, experience; it was medieval, gothic and therefore barbarous. At the same time, the great legal historians made it their happy hunting ground, and history cast upon it an iron grip which has not yet been relaxed. So, Cyprian Williams, the friend of Maitland, treated the problem of land ownership as an exclusively historical problem. The concept of the estate was shown to have originated in the universality of feudal tenure, and with this historical demonstration he was content. Then came the seeming revolution of 1925 and a healthy, though sub-conscious, urge to escape from the meshes of history; if the estate depends on tenure, and tenure is obsolete, why should not the estate also be abandoned to the museum of history? To this must be added the emergence of some pseudo-history—especially the myth that “the King was the owner of the land in the true sense of the word, and he was the sole owner.”³ There is no foundation or authority for this statement in the books. If it were valid, we should expect the *dominium* of the King’s demesne to be treated differently from the estate of a private person; but as far as we know the royal demesne land was always conceived of as being within the ambit of the doctrine of estates—the King himself held his land in fee simple, though he did not hold it “of” another. Nor is the statement in any way a necessary corollary of the doctrine of estates, or even of the doctrine of tenure. The truth is that words such as “ownership” and its derivatives are not part of the language of land law, and in consequence sentences such as the one we have cited have strictly no legal meaning at all. This, of course, is a necessary postulate in a system of law which does not accept ownership as a legal concept. Yet to propound such a statement as having some technical meaning at once leads to the criticism that it no longer corresponds to truth, and that in consequence the concept of the estate, its derivative, is necessarily obsolete.⁴

³ p. 13.

⁴ A similar, though perhaps more venial, misuse of words is to speak of the “ownership” of an estate, of an “estate owner,” and the like. One can no more “own” an estate than one can “own” a right. An estate is vested in a tenant; the tenant in fee is seised (or possessed if you prefer) of land for an estate in fee. To deny ownership of land but to accept ownership of an estate in land is merely to push back one stage the problem of ownership—perhaps the first stage in an infinite regress—and is bound to create difficulties of analysis. It leads, for instance, to the peculiar view (accepted it

Once we free ourselves from the strait-jacket of Roman ownership—a “crude, isolated but necessarily complex, notion” as Professor Lawson has called it⁵—it is not difficult to see that the estate concept is still valid even when removed from the historical context of tenure, just as the word tenant is equally significant as a description of the person who possesses or holds land whether or not he holds it “of” another. A complete analysis of ownership would necessarily distinguish between ownership of land and ownership of chattels, for land has the unique feature of indestructibility, and it is this unique feature which makes the estate concept singularly appropriate and helpful. We would go further and suggest that the concept is equally appropriate to chattels, and would have been equally helpful in that branch of law had the nineteenth-century lawyers appreciated its value and significance. It would still be a useful piece of research to investigate from this point of view the history of chattel law; the use of such concepts as general and special property seems to suggest a movement towards a doctrine equivalent to that of the estate in land which was perhaps prevented from growing only by the spread of continental ideas by the jurists of the nineteenth century.

Nor would it be difficult to illustrate the practical consequences of the separation of the estate from the land, and of the contemporary tendency to ignore it. One example must suffice; we will take it from the first of the recent Mortmain cases.⁶ Had the attention of the court been drawn to the distinction between the land and the estate in the land, it would have had no difficulty in deciding that the Mortmain and Charitable Uses Act, 1888, actually meant what it says—that an alienation in mortmain works a forfeiture of the land itself, and not of the estate alienated—not even of the estate vested in the grantor. That is why an unfortunate definition clause, which obscured the distinction, had to be removed by the amending Act of 1891. That, too, is why in the old cases a distinction was drawn between alienations which were and alienations which were not, alienations in mortmain. To impose the penalty of loss of the land itself upon the grant of a short term of years would clearly be contrary to the intention of the statute, for the threat of the dead hand can have no relevance to a temporary arrangement.

More insidious, but ultimately more dangerous, is the modern tendency to replace the language of estates by the language of

seems by Dr. Cheshire—see p. 122) that the 1947 Planning Act has transformed the tenant in fee into “the owner of the fee simple in the use of Blackacre as a private dwelling-house.” Bearing in mind that “ownership” includes the right to use, and that a fee simple includes the right to use, this definition becomes “one who has the right to use the right to use the use of Blackacre as a private dwelling-house,” and the tautology is at once apparent.

⁵ *The Rational Strength of English Law*, p. 85.

⁶ *Morelle v. Waterworth* [1955] 1 Q.B. 1.

ownership. We have drawn attention elsewhere⁷ to this practice as it is reflected in the law reports, beginning during the fifties of the last century—significantly after Austin's journey to the Continent in search of jurisprudence. The use of the word "owner" in various statutes of the present century is no doubt an extension of this practice, but in part at least it is due to the new species of administrative lawyer whose expansionist policy is better served by the ambiguity of popular phrases than by the language of precise thought. On the negative side, lack of understanding of the concept of the estate has led to curious results. The courts have refused the title of estate to the statutory tenancy,⁸ while the licensed possessor is denied even an interest in the land in which he is interested⁹; yet if words mean anything at all, the statutory tenancy and the interest of the licensed possessor are, while they last, as fully entitled to be called estates as the estate in fee simple. Inevitably ambiguity of language leads to ambiguity of thought. No better illustration could be given than the passage on p. 557, where Dr. Cheshire examines the substantive consequences of a mortgage by demise. The passage is too long to give in full. Suffice it that it contains these sentences—"The proviso for cesser still makes it appear that the penalty for non-payment on the contractual date is the transfer of absolute ownership to the mortgagee" (surely a misstatement in any event), and "It has been doubted, however, whether the mortgagor is also the owner in equity of the mortgaged property, as he was before 1926." If the reader will translate the whole passage into accurate legal English he will quickly discover that the doubts disappear into thin air.

Inevitably, the obscurity becomes most evident, and most pernicious, when Dr. Cheshire discusses those topics which raise directly the basic problems of ownership—proof of title, and the Limitation Act. Proof of title is dealt with (necessarily briefly) on pp. 643-644. The passage opens in the language of ownership. "The first and main duty of the vendor is to prove that he is the owner of what he has agreed to sell . . . he is deemed *prima facie* to have discharged this duty if he can show the history of the ownership for not less than a certain period . . . now fixed at thirty years for open contracts." It then changes to the language of estates. ". . . thirty years is the minimum period. . . . If the documents which he produces show that the legal estate is now vested in him, he cannot be asked to show what dispositions of the land were made more than thirty years ago, but if the documents do not clearly prove that fact, then he is bound to establish it, even though the proof may necessitate abstracting documents more than thirty years old." We cannot pause to investigate the meaning of this last sentence,

⁷ "Terminology and Title in Ejectment" (1940) 56 L.Q.R., p. 376.

⁸ Cheshire, p. 847.

⁹ p. 363.

though we guess that its obscurity is due to the use of the phrase "the legal estate" as though it were identical with ownership. Our concern is with the first sentence. Clearly, if I own today it is irrelevant who owned thirty years ago. Equally clearly, if my ownership today cannot be proved without relying on the ownership of thirty years ago, that ownership in its turn cannot be proved without going back a further thirty years, and so on *ad infinitum*—unless of course there is some magic in the period of thirty years which creates a prescriptive ownership and which nobody has yet discovered. Hence we must assume—as Dr. Cheshire seems to admit—that in normal cases proof of ownership can never be more substantial than *prima facie* proof. We are thus drawn to the conclusion that English land law is based upon an ownership which is incapable of precise demonstration.

We cannot believe that our land law is so intellectually barren. Let us restate briefly the position, using words which have a precise legal meaning and eschewing popular, non-legal ambiguities such as ownership. One aspect of an estate is that it represents the tenant's title to the land which he possesses. Possession itself is a root of title—if I prove that I am in possession, that in itself is infallible proof that an estate is vested in me. If I further show that I obtained my estate by grant from Smith, that is infallible proof that I have a title to the land originating at the very least in Smith's possession. All titles are thus ultimately based upon the fact of possession. All titles are thus capable of precise proof. But though there can be only one estate in the land, that of the tenant in possession (we ignore derivative estates such as reversions and remainders), there can be many titles, competing and conflicting titles, each based ultimately on possession and ranking in order of legal value in accordance with the order in time of that ultimate possession. Against this background of relative titles, the practice of conveyancing is seen to be both apt and intelligible. No one title can be shown to be superior to all other possible titles. But to show that possession has been enjoyed under one title for a long period of time—say sixty years, or (under modern statutes) thirty years—is to establish a factual presumption that that particular title is not likely to be challenged in the future. This business-like attitude of the conveyancers is itself sufficient to show that English land law is based upon the doctrine of relativity of titles rather than on the theory of ownership of land. No doubt it was his failure to weigh this practice against the careless utterances of some nineteenth-century judges that helped the late Sir William Holdsworth—a very great lawyer—in his *History* to assume that the doctrine of relativity had been abandoned in favour of ownership, a heresy which he subsequently, though grudgingly, recanted.¹⁰

¹⁰ Compare (1940) 46 L.Q.R., p. 479—"The medieval principle of the relativity of titles" still holds—with *e.g.*, H.E.L., VII, p. 62.

It will be observed that the conveyancing practice as to proof of title is not directly affected by the Limitation Act, 1939, the reason being that the negative operation of that Act, combined with its lenient treatment of reversionary rights, makes it impossible ever to prove the non-existence of some superior title continuing, say, as a reversion on a forgotten long lease. Proof of title is concerned with the status of one given title in relation to all other possible titles. Limitation simply affects the validity of one title in relation to another specific title, both being shown to exist by ordinary methods of proof. Yet though it deals with a separate problem, the Act is clearly relevant when discussing the problem of ownership. Now the present rules of limitation contain many obscurities, especially in relation to terms of years, and the 1939 Act has added to their number by its attempt to incorporate the highly questionable doctrine of *Trustees, Executors and Agency Co., Ltd. v. Short*.¹¹ But at least in relation to freehold interests the general principles are clear, and those general principles necessarily postulate the doctrine of relativity of titles. A disseisor acquires an estate in the land by virtue of his seisin, and this estate represents his title to the land. The disseisee, being no longer seised, has no estate, but he retains a title to the land which can be enforced by entry or action. If he fail to enforce his title within the period of limitation, his title is extinguished, and the title of the disseisee thus becomes indefeasible as against the disseisor (though not necessarily as against all others, for there may be outstanding an earlier title not yet extinguished by the Act). There is thus no "parliamentary conveyance" of either estate or title from disseisee to disseisor.

Any attempt to express these doctrines in terms of "true ownership" is bound to create difficulties, and Dr. Cheshire, master of exposition though he is, has not succeeded in avoiding them. Both the words ownership and title are constantly occurring, but there is no hint as to their meaning, or their relation to each other:— is ownership a title? if so, are there titles which are not ownership?

¹¹ (1888) 13 App.Cas. 793. This was an appeal from Australia at a time when titles could easily be traced back to the original Crown grant, and in such circumstances the emotional appeal of ownership proved irresistible. But the technical basis of the decision—that after the squatter "abandoned possession" there was nobody whom the plaintiff could sue—is surely untenable. Since when has it been a defence in ejectment to plead "not now seised"? There was no reference to the availability of substituted service. Nor was there any reference to the fact that the Limitation Acts were based on the barring of the remedy; that the plaintiff's remedies were either action or entry; and that neither remedy had been pursued within the statutory period. It would be interesting to know what would have happened if the defendant had "abandoned possession." Would the squatter's possession have revived?

The 1939 Act (s. 10) adds to the confusion by introducing a new conception of "adverse possession" which seems based on prescription rather than limitation. There is never anybody "in whose favour the period of limitation can run." Fortunately, in a congested country like England, by contrast with the Australia of the nineteenth century, the point is likely to remain academic.

what then are they? On page 770, we are introduced to X as "the person who is in the course of obtaining a possessory title." X, we are told, has a "transmissible interest in the land." He is then contrasted with the "true owner," and we gather that while X may abandon possession, the "true owner" cannot. Later,¹² there is a section dealing with "The Nature of the Title acquired under the Statute." Dr. Cheshire begins by saying that the Statute "leaves the occupant with a title gained by the fact of possession, and resting on the inferiority of others to eject him." He gets a "good possessory title." "Thus, he will be tenant *pur autre vie* if the person against whom time has run was a tenant for life under a settlement." (With respect, he will be tenant in fee, for he is a disseisor.) "If he dispossesses a tenant for years he is entitled to retain possession until the period fixed by the lease expires." But nowhere are we told what the disseisor acquires when the person disseised is an ordinary tenant in fee. Does he become the "true owner"? Apparently not, for "though he acquires an interest equal in size to that of the former owner, he does not acquire the very interest itself . . . it is a heresy to say . . . that the effect of twelve years' adverse possession is 'to make a parliamentary conveyance of the land to the person in possession.'" It would be interesting to know what the beginner makes of all this.

Passing from ownership and possession to the incumbrance, the third of the basic concepts suggested in an earlier paragraph of this essay, the problem here is less one of accurate exposition than of systematic treatment. It is a matter of some interest that no systematic analysis of this concept exists—partly no doubt because of the haphazard way in which the various particular incumbrances have emerged, partly because of the eighteenth century's emphasis on property rights at the expense of duties, and partly (if not mainly) because the jurists have paid inadequate attention to English land law. Against this background of neglect and misdirected effort it is not surprising, though it is still to be regretted, that the best of the current books has made no attempt to fill the gap. Dr. Cheshire deals with incumbrances in Book II, Part III—Commercial Interests. The first chapter deals with leaseholds. Then follow chapters on Easements and Profits, Restrictive Covenants, Rentcharges, and finally Mortgages. Each chapter is excellent in itself, but the thoughtful student will inevitably emerge with his conviction strengthened that land law is little more than a heterogeneous collection of rules of thumb.

Many lawyers no doubt would accept this conclusion, and even insist that it is sufficient as well as correct. To them, land law—they would prefer the obsolete and misleading term, Real Property

¹² p. 780.

—is little more than an introduction to conveyancing, and conveyancing is not a science, with its implication of principle, consistency and unity, but an art built up from the debris of centuries of practice, legislation and tradition, the product of ingenuity out of chaos. Academic discussions—say, of ownership—are of no help in the drafting of tax avoidance schemes. The very word “ownership” has been used for something like a century by judges and legislators; that it is a word not capable of precise definition in the sphere of land law merely indicates that to a conveyancer it is not a concept requiring precise thought. Dr. Cheshire seems to accept the foundation of this view. In his first sentence he tells us that “The main object of embarking upon the study of real property is . . . to fit oneself for the art and practice of conveyancing”. We cannot, however, believe that he could also accept the defeatist conclusions which can too easily be drawn from this premise. Yet to begin by assuming that land law is the “hand-maiden to the law of conveyancing,”¹³ rather than a subject worthy of study in its own right, must inevitably increase the difficulties of analysis, and we would suggest that here lies the clue to some at least of Dr. Cheshire’s obscurities.

No one, of course, will deny that much substantive law has been secreted in the interstices of conveyancing. The same is at least equally true of the law of contract. Indeed, the whole law of contract is entirely dependent on the making of agreements, whereas, even if conveyancing were to be abolished overnight, there would still remain vast tracts of land law practically unaffected by the change. Yet this complete dependence of contract law on the making of agreements has not prevented the emergence of a solid, coherent body of substantive law which has been, and is, studied systematically. The one difference is that most contracts are drafted by laymen, whereas conveyancing is the monopoly of the lawyers. Must land law wait for a systematic investigation until that monopoly be broken? Again, conveyancing is essentially a technique, a process akin to the procedure of litigation. It is still fundamentally true, to adapt Dr. Cheshire’s opening words, that “the main object of embarking on the study of the law of tort is . . . to fit oneself for the art and practice of litigation.” Everyone recognises the tremendous developments, the almost revolutionary progress, that has taken place in the law of tort since the abolition of the forms of action allowed us to disentangle the substantive law from the technique of procedure. Must the landlawyers simplify even further their own particular technique of conveyancing before being permitted to share in the intellectual advances enjoyed by their brothers of the common law? But this is a big subject. Suffice it to say that in view of the changed attitude during the last century in every other basic branch of law,

¹³ p. 3.

the onus of proof lies heavily on those who assert that land law alone must be deprived of the beneficent spirit of the Judicature Acts.

We are very conscious that it is unfair to direct this fire of criticism against Dr. Cheshire alone. He suffers the penalty of eminence; to many of us modern land law and Cheshire are almost synonymous. But our real concern is with the present position of land law studies and with the neglect into which its basic principles have fallen. Before 1926, we relied, and not in vain, on the works of the old conveyancers, men like Challis, Williams and Lightwood. These great men spent their years of practice in the very heart of land law, and their experience, and that of their generation, gave us deep-thoughted books and the culminating virtuosity of the 1925 legislation. Today their successors in Lincoln's Inn live in a world in which the centre of gravity has changed; much, too much perhaps, of the time of the best legal brains is spent in circumventing the planner and the tax-gatherer, worthy objects no doubt, but ephemeral, and on the periphery of things, scarcely likely to direct their thoughts to the basic problems of property law. For the systematic study of these basic problems we must now for the first time look to the new race of academic lawyers. Hitherto, having no separate tradition of their own, the tiny band of academic land lawyers have been content to follow the example of the practitioners, into whose shoes indeed too many of them hope to step.¹⁴ Will they accept the responsibility that is inevitably theirs? Professor Lawson, in his recent Hamlyn Lectures, has shown something of the harvest that can be garnered by a jurist who is prepared to give sympathetic attention to English land law. Dr. Cheshire has had the courage and the vision to change the shape of his textbook, after almost thirty years of unrivalled success, at the behest of an essentially juristic analysis. Perhaps the renaissance has already begun.

A. D. HARGREAVES.*

¹⁴ And can one blame them? What future is there for the young lawyer who is prepared to devote his life to the study of the basic principles of land law? How many Chairs in Land Law are there? What encouragement is given to its academic study?

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THE CORE OF A CONTRACT

DEVLIN J. in *Smeaton Hanscombe & Co., Ltd. v. Sassoon I. Setty & Co.* (No. 1)¹ has provided us with a definition of a "fundamental term" of a contract, in further development of this, by no means new, conception. He has also provided an illustration of such a term, and a statement of principle concerning the effect of a breach. The application so far is to protective clauses which attempt to exclude liability for breaches of contract, but it may have other applications, for example, to mistake in formation of agreement.

There is, however, in this decision no attempt to survey the field, or to deal with cases which may be in conflict. There are such cases, and a statutory provision, and, in consequence, the matter deserves attention, for it is believed that the development of the idea would be beneficial.

What would appear at first sight to be the greatest difficulty is probably the least, namely, the decision of *L'Estrange v. Graucob*² and a problem that that case suggests. It will be recalled that the plaintiff had agreed to buy a slot machine which failed to function, and she sought recovery of her money. The defendants relied on an express clause in the contract which excluded both express and implied conditions and warranties, but adding "except so far as stated herein." The court accepted that clause as effective to relieve the defendants of liability in respect of the slot machine's failure to work, and the fact that it could not be made to work. It will be observed that the clause used in that case contained a self-contradiction, since it purported to exclude (*inter alia*) express terms, yet it excepted from that exclusion "terms stated therein." Provided that that document represents the whole of the terms agreed (as to which there seems to be no doubt) it does not in fact exclude express terms. This fact seems to have been overlooked, and the case proceeded on the basis that express conditions were excluded. In consequence the decision is generally regarded as authority for the proposition that such exclusion of express terms is possible and permissible legally, an interpretation that is strengthened by the court's having spoken of the term used as having closed the gap left by *Andrews v. Singer*,³ where there was a clause which did not purport to do more than exclude implied terms. Does this mean, then, that a man can contract to supply a slot machine, and, by an appropriate clause, shed any liability for delivering an unworkable thing, or a dustbin, or a piece of scrap-metal? It is not enough to say that if he delivers

¹ [1953] 1 W.L.R. 1468.

² [1934] 2 K.B. 394.

³ [1934] 1 K.B. 17.

scrap-metal, or anything else not looking like a slot machine, he has not performed his contract and can be sued for breach, because if he can perform it by delivering a piece of metal looking like a slot machine, but which will no more function like one than scrap-metal would, the customer is in no better position than if scrap-metal had been delivered.

It is judged to be an injustice that any clause could protect a supplier from liability for supplying a useless article. The supplier should be fixed with liability, whatever form of clause he devises, to supply something that not only looks like the thing it is intended to represent, but is also of a construction that can be made to function, by a competent person, in the capacity normally expected of the thing, and, moreover, can be made to function without extensive work or expense on it. There may possibly be a case where the buyer takes a chance, and says, in effect, "I will have that," referring to a specific thing before him, so that no liability accrues to the supplier in respect of defects. But even this type of case is not necessarily one where there is no liability, as suggested below. Subject to the possible exception where it is clear that the buyer is taking a chance, *L'Estrange v. Graucob*² ought to be prevented from acting as a charter for suppliers who are completely indifferent to the real wants of their customers. In view of what has been said above about that case this should not be difficult, and it may be added that the decision does not go so far as to approve the delivery of a different kind of thing, subject to what may be meant by difference in kind.

CONDITIONS AND FUNDAMENTAL TERMS IN SALE OF GOODS

In considering whether the power to exclude liability for breach of conditions and warranties may be limited in some way, we have a further difficulty to meet in the form of section 13 of the Sale of Goods Act, 1893, where the sale is by description. That section enacts that in a sale by description the description is a "condition." If *L'Estrange v. Graucob*, as commonly interpreted, is right in asserting that conditions may be excluded, including even express conditions, then there is here a ground for arguing that the conditions concerning description may be excluded, and all protection such as is being sought will be gone. This difficulty is made the greater by the decision of *Wallis Sons & Wells v. Pratt & Haynes*,⁴ where the House of Lords adopted the dissenting judgment of Fletcher Moulton L.J. in the Court of Appeal (*infra*). That learned Lord Justice defined a breach of condition as "a substantial failure to perform the contract" in one passage, and as "a total failure" in another passage, and there seems little doubt but that a condition was regarded as something as fundamental as anything

⁴ [1911] A.C. 394.

can be. Since, in the light of the new decision, it will be submitted that there is a distinction between the true fundamental term and a condition, in addition to the distinction between conditions and warranties, there is room for difference of opinion.

The problem is one, commonly encountered, of the relationship between matters of degree and matters of limits. If a man promises to deliver seed to a farmer, and he sends nothing at all, clearly there is a breach of contract. We do not need to speak of the breach of a condition; indeed we can hardly do so if the term condition means a term of the contract. For, nothing having been done, terms relating to the performance have no source of life. The limit between non-performance and performance has not been crossed. If the supplier sends something wholly alien to the contract, *e.g.*, a load of turf, we can still say that the limit between non-performance and performance has not been crossed. In the first case the dog has not come out of his kennel, in the second case he has come out but gone off in the wrong direction. These are clear examples of the concept of a fundamental breach in the narrowest sense. The difficulty arises when the dog comes out of his kennel and starts off in the right direction but does not arrive. If a farmer orders seed by the description "common English sainfoin" and he receives some other sort of seed, is this a case where we can say that there has been a degree of performance but not full performance, or is it one where the limit of non-performance has not been stepped over? If we say that there has still been a fundamental breach in the sense of non-performance, as distinct from breach of a condition or warranty, we must not only explain away section 13 of the Sale of Goods Act to the effect that words of description are conditions, but we must then seek a way of limiting the word "condition" to such matters as time and place of delivery; method of packing or transport; failure to comply as to quantity, particularly in instalment contracts; of which we have such examples as *Re Moore & Landauer*⁵ (tins packed in cases of twenty-four instead of thirty); *Manbre Saccharine Co. v. Corn Products*⁶ (promise to send goods in 280lb. bags but sent in 220 and 140lb. bags); *Bettini v. Gye*⁷ (missing four out of six days' rehearsal held not to be breach of condition); *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.*⁸ (one instalment of goods out of a large number found to be slightly under quality by chemical analysis held not a breach of condition).

It may not be too difficult to limit the concept of a condition in this way if we consider for a moment that there is an element of contradiction in the idea that conditions can be excluded by express terms. We know from *Andrews v. Singer* that words of description are express terms (said to be "conditions"), and we may well

⁵ [1921] 2 K.B. 519.

⁷ (1876) 1 Q.B.D. 183.

⁸ [1934] 1 K.B. 148.

⁶ [1919] 1 K.B. 198.

ask: if a man can by words of description expressly promise something, how can he at the same time by another express condition rid himself of liability to perform that promise? The two terms are self-contradictory. One solution would be to treat such a contract as a nullity and allow either party to recover what he has paid or transferred, but the law leans against declaring contracts to be meaningless.⁹ There is no doubt that in *Wallis v. Pratt* the various courts before whom the case was argued were invited to say that the clause in the contract could exempt the sellers from liability for breach of the term as to description, and though the House of Lords rejected that, they did so, not because it was not possible to do that, but because the words used were not apt. But the House of Lords did not go on to say what the position would be if the words were apt, and it seems still open to the House to say that self-contradictory terms cannot exist in a contract, and to suggest a solution. More agile acrobatics have been performed by the House on previous occasions than is called for here.

Indeed we can even argue that Fletcher Moulton L.J. in his adoption of such an extreme description of a condition as something as fundamental as a term can be, was concerned to prevent the clause from operating more than concerned with delineating the meaning of the word "condition" for all time. According to the report¹⁰ the difference in kind between common English sainfoin ordered by the buyers and giant sainfoin delivered by the sellers is not so very great. This is indicated by the fact that the prices of the two sorts of seed were in the ratio 4:3. Both could apparently be used for fodder, but common English lasts for six or seven years as against three years for the other, and among other advantages, is less coarse and covers the ground better, and does not go to seed more than once a year. Yet the degree of disparity on those considerations is obviously material, and we can imagine that a farmer might well regard one as no substitute for the other. Hence, it is submitted, Fletcher Moulton L.J. was right in regarding the difference between the two seeds as something fundamental in the full sense of the word, and his only reason for relating that description of its importance to the term "condition" is that wholly unnecessary section in the Sale of Goods Act: s. 13.

It would seem that there is an inherent contradiction in the Act itself, since section 11 (1) (c) enacts that the right to avoid for breach of condition is lost in the circumstances there specified. If words of description are fundamental in the sense of *Wallis v. Pratt*, then the Act seems to be saying that, notwithstanding that the contract has not been performed, it still holds good. To avoid that result, section 13 ought to be interpreted on the basis that "condition" has a different meaning, as compared with its meaning for other sections.

⁹ *Hillas v. Arcos* (1932) 147 L.T. 503.

¹⁰ [1910] 2 K.B. 1003.

In this light we may appreciate Devlin J.'s judgment in the *Smeaton Hanscombe* case, for the learned judge does not take the orthodox view that the terms "condition" and "fundamental term" are coincident. He puts forward the view mentioned above that some terms are more fundamental than conditions. The facts in the case were that there was a contract for the supply of "about thirty-five tons of round mahogany logs," and there were provisions concerning the quality of the timber. The goods were to be shipped to Liverpool, and there was an exceptions clause under which the supplier was not to be liable for any breach unless the claim for compensation was made within fourteen days of discharge of the cargo. Only twenty-one tons were supplied under the contract, and they were of inferior quality. The cargo was discharged at Liverpool, where the buyers' agents inspected it and reported the defects, but the buyers allowed the logs to be forwarded to their works at High Wycombe. Subsequently they lodged a complaint concerning the quality and quantity, and the complaint would have been in time if the fourteen days were to be calculated from the date of discharge at High Wycombe, but not if calculated from discharge at Liverpool.

It was held that the proper construction of the contract required that the time be calculated from discharge at Liverpool. Thus the claim was out of time, and in consequence the buyers had to seek some way of attacking the validity of the time limit clause. The argument which they put forward was that the time limit clause could not be relied on by a party who had himself committed a breach of a condition by not supplying goods according to the description in the contract, and a dictum of Roche J. in support of that view was quoted from *Pinnock v. Lewis & Peat, Ltd.*¹¹ This argument was accepted in principle by Devlin J., but his Lordship was not prepared to say that any breach of condition would be sufficient to prevent a party from relying on a protecting clause. Turning to the case of *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.*,¹² where similar arguments were advanced, his Lordship pointed out that Lord Sumner expressed the view that for this argument to succeed the breach must be a breach of something fundamental in the sense of something underlying the whole contract. But, as Lord Sumner did not define what he meant by fundamental, Devlin J. was left to fill the gap, which he did, remarking that the term had never been closely defined. His Lordship said:

"It must be something, I think, narrower than a condition of the contract, for it would be limiting exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that if it is not complied with the performance becomes something

¹¹ [1923] 1 K.B. 690.

¹² [1922] 2 A.C. 250, 260.

totally different from that which the contract contemplates. If, for example, instead of delivering mahogany logs the sellers delivered pine logs, and the buyers inadvertently omitted to have them examined for fourteen days, it might well be that the sellers could not rely on the time clause."

and his Lordship found that in the case in question, the breach, though a breach of a condition as to description, was not a breach of a fundamental term in that narrow sense.

The hypothetical example of the distinction between pine and mahogany is comparable to the distinction between a slot machine and scrap-metal, though not wholly analogous. In both cases there is such a difference in kind that we know the buyer's purpose will not be served. Can we properly conclude that the distinction includes that between a machine that could be made to work and one that cannot? Since a machine that cannot be made to work is really no better than scrap, such a conclusion does not demand very much.

FUNDAMENTAL TERMS IN OTHER CONTRACTS

This concept of a term more fundamental than a condition is not confined to contracts of sale, and receives support from other decisions. Strong support for the principle can be found in a Scottish House of Lords' case: *W. & S. Pollock v. Macrae*.¹³ That was a contract to manufacture two engines for a fishing vessel. One engine was defective and never functioned properly so that the buyer in consequence lost the fishing season for that boat. The contract contained a clause stating that the manufacturer should not be liable for "any direct or consequential damage arising from defective material or workmanship even when such goods are supplied under the usual form of guarantee." The usual form of guarantee was an undertaking to repair and replace free of charge during the twelve months from the date of the invoice any defective parts caused by bad workmanship or material, and was not applicable in the circumstances of this case. Lord Dunedin, in giving the judgment of the court, said that, though protective clauses may be inserted by the seller especially for things beyond their control, "it is not usual that they should in addition contain conditions which amount to a counter-stipulation on the part of the buyer that he will forgo the ordinary remedies which the law gives him in the event of a breach of contract. Such conditions to be effectual must be most clearly and unambiguously expressed. . . . I am of opinion that, though (these clauses) excuse from damage flowing from the insufficiency of a part or parts of the machinery, *they have no application* to damage arising when there has been a total breach of contract *by failing to supply the article truly contracted for.*" Then later his Lordship says: "Now when there is

¹³ (1913) 60 Scot.L.Rep. 11.

such a congeries of defects as to destroy the *workable character of the machine*, this amounts to a total breach of contract, and each defect cannot be taken by itself separately so as to apply the provisions of the conditions and make it impossible to obtain damages."

Turning now to cases not concerned with sale we have, first, *Alexander v. Railway Executive*,¹⁴ another decision of Devlin J. There a bailee allowed a stranger to have access to deposited articles (and apparently was allowed to break open one of them), and that was held to be such a fundamental breach of the contract of bailment as to disentitle the bailee from relying on clauses which might have protected him. There is also a dictum in that case, based on the judge's memory of a case, where the leaving of a delivery van unattended was held to be a fundamental breach. Reference was also made to *Lilley v. Doubleday*¹⁵ as of the same class. In *Alexander v. Railway Executive*¹⁴ it was said that it is a general principle of the law of contract that where there has been a breach of a fundamental term of a contract giving the other party the right to rescind it, then, unless and until, with full knowledge of all facts, he elects to affirm the contract and not to rescind it, the special terms of the contract go and cannot be relied on by the defaulting party (quoting from *Hain Steamship v. Tate & Lyle*¹⁶).

There is yet another line of cases concerning carriage of goods by sea. An unjustifiable deviation amounts to a fundamental breach of the contract of affreightment. Thus in *Glynn v. Margetson*¹⁷ the contract was for the carriage of oranges from Malaga to Liverpool, and as a result of an unjustified deviation the oranges were delivered in a damaged state. There was a protective clause giving the ship liberty to call at a variety of ports scattered widely along the route. The House of Lords nevertheless refused to allow a construction which would defeat the main object of the contract: they refused to allow the protective clause concerning deviations to protect the ship from an unjustifiable deviation. The case is not quite so strong as we would like because, the contract being drawn up on a printed form obviously intended to serve for many routes, it was easy to imply that there was no intention that the protective clause should apply in full to all the various routes taken by that shipping line. Nevertheless the principle that adherence to the route is a term fundamental to a shipping contract, and that effect shall not be given to clauses which endeavour to protect a ship if it unjustifiably departs from the route, is clearly a principle envisaged in this case.

But there are other cases following this principle. Thus we

¹⁴ [1951] 2 K.B. 882.

¹⁵ (1881) 7 Q.B.D. 510.

¹⁶ (1936) 52 T.L.R. 617.

¹⁷ [1893] A.C. 351.

find the principle in *Thorley v. Orchis*,¹⁸ and it is pertinent to observe that one of the judgments of this Court of Appeal decision was delivered by Fletcher Moulton L.J., who said: "... for a long series of years the courts have held that a deviation is a serious matter, and changes the character of the contemplated voyage so essentially that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of the stipulations in his favour contained in the bill of lading."

It is of interest to speculate what Fletcher Moulton L.J.'s opinion would have been of the proposition that a clause designed to protect a shipowner from an unjustified deviation ought not to operate. His Lordship did not say in *Wallis v. Pratt* that a condition could be excluded. Since we have, it is submitted, disposed of *L'Estrange v. Graucob*, the field would have been open for holding that conditions cannot be excluded by protective clauses, prior to the *Smeaton Hanscombe* case. But perhaps the narrower doctrine is preferable as being less extreme and less open to objection.

What terms then are fundamental in this narrow sense? To see this more clearly we might usefully analyse a contract in the following manner; we may say that it has the following elements:

1. The parties.
2. The price or consideration.
3. The main promise or core of the contract indicating the purpose of the contract.
4. The provisions relating to the main promise, *i.e.*, subsidiary promises concerning mode of performance and the like.

These are divisible into:

- (a) important provisions or essential undertakings express or implied (called conditions);
- (b) desirable or collateral provisions express or implied (called warranties).

Thus in the *Smeaton Hanscombe* case the purpose of the contract was the supply of mahogany logs: this was the core of the contract whereas the provision relating to making complaints in a given time was a vital subsidiary promise. What about the percentage under-grade in that case? It is a pity that we do not know more about that, because it ought to be added that "mahogany logs" means logs that can provide usable timber and not so worm-ridden as to be usable only for firewood. This contention does perhaps trespass to some extent on section 14 (2) of the Sale of Goods Act, but, as Lord Ellenborough said in *Gardiner v. Gray*¹⁹ (a pre-Act case), a purchaser does not buy goods to lay them on a dunghill. It would

¹⁸ [1907] 1 K.B. 660, 669.

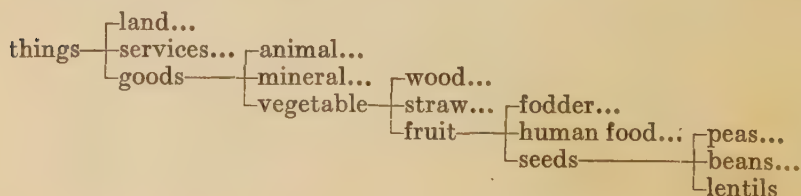
¹⁹ (1815) 4 Camp. 144.

not be unreasonable to interpret that section as merely concerned to exclude purposes not apparent from the nature of the contract.

THE CORE OF A CONTRACT

What may often prove to be the most important practical point is yet to be discussed, namely, how do we find, in a given contract, what the central promise is, distinct from any subsidiary promise? It would, of course, be possible to have a compound contract containing more than one core, each with its subsidiary promises, or sharing subsidiary promises, but that would merely be a matter for severance. It is suggested that, in principle, the distinction is comparable to that between nouns and adjectives, but only by way of analogy: it is not suggested that the core can be delineated only by nouns, or that nouns may not refer to subsidiary matters. But there is a difference between naming a thing and describing the particular named kind of thing. On this basis we could argue that, when section 13 of the Sale of Goods Act says that the description of goods is a condition, that section ought not to be allowed to apply to the fundamental process of naming the subject-matter.

But, as mentioned, the naming of a thing may include some adjectives. For example, a man developing a stud farm is not likely to buy "a horse" (though a vendor of horse meat might) but would instead include descriptive adjectives of the type of animal. Equally nouns may be used as denoting subsidiary matters: for example, one can conceive of a contract to buy peas where there is no guarantee that beans will not be sent because the buyer is known to want leguminous starch of carbohydrate, but has a preference for peas. The law will have to look behind the words used in some cases to see what the main purpose is. In every contract there is a point in the scale of detailed description at which the contract may be said to be based and that point may be regarded as the core. On the basis of the diagram below we may say that, having found the basis, the vendor will not be excused for delivering something which falls to the left of the basis, whilst the purchaser cannot contend that protective clauses are inapplicable to things to the right of the basis: for breach of these he must be content with the present acknowledged remedies. The scale referred to would take on some such appearance as the following:—



and so on *ad infinitum*. Much the same principles apply to the other two points: the parties and the price. These are fundamental too, as seen in cases on mistake as to identity of party, and cases such as *Hartog v. Colin & Shields*²⁰ and *May & Butcher v. R.*¹ But in those cases the detailed development is less extensive.

It seems that in endeavouring to ascertain what is the fundamental basis one must look to the purpose of the contract. We cannot fly in the face of the *caveat emptor* rule, but we do not have to do that if we limit the purpose in an objective manner to that which may reasonably be deduced from the nature of the thing or service contracted for in the light of the circumstances, and what each party may reasonably be supposed to know of the other's intention, and no harm would be done if the crudeness of the *caveat emptor* rule were refined. The matter is not easy but would probably proceed on the following lines, taking as our example the purchase of an electric motor. The buyer is entitled to expect that the thing he gets will produce a shaft rotating under power when the electricity is switched on. There are, however, lots of different sorts of motor, and in practice a buyer is not likely to order "an electric motor" pure and simple, or, if he did, a supplier is almost bound to ask him what sort he wants. There is the question whether it is designed for A.C. supplies or D.C. supplies; the question of the voltage, for in industry there are various voltages in use; then obviously there is the question of the power of the machine needed for the job in hand. It looks as though quite a lot of detail would be fundamental in such a case if these items were specified, including what at first sight might be said to be "mere description." On the other hand, by means of converters or rectifiers, A.C. machines can be used on D.C. and vice versa,² and by means of transformers, etc., a machine designed for one voltage can be adapted for another, and by gearing a small motor can handle bigger loads than it could direct, though of course at less speed. So if these things were not specified it would be hard to imply them, and therefore the question whether such details were fundamental would come to be decided by what the seller ought to be supposed to know about the buyer's wants. At least the principle would protect a buyer of a new motor from having no remedy, because of an exceptions clause, where the supplier supplies a burnt-out motor (even though a competent person can rewind it), which is the equivalent of our slot machine and scrap-metal example. It may be less likely that the courts would apply these principles to contracts relating to second-hand goods: *i.e.*, in such a case it is more probable that the buyer is taking a chance.

So far we have been considering express fundamental terms in cases of (*inter alia*) the sale of non-specific goods. Does

²⁰ [1939] 3 All E.R. 566.

¹ [1934] 2 K.B. 17n.

² Not usually an economic proposition.

the concept of fundamental term apply to the sale of specific things or property? Can we imply fundamental terms which cannot be excluded by express terms? Again, if express descriptions are used concerning specific things, can these express terms still be regarded as fundamental so that delivery of the specific thing results in a breach of contract?

With regard to implying fundamental terms it does seem that circumstances may well imply something about a specific thing. An opaque bottle on the counter of a self-service cafeteria is impliedly describing itself as a drink suitable for human consumption because of the circumstances; and in *Gompertz v. Bartlett*³ a bill of exchange was held impliedly to describe itself as a foreign bill, although it was in fact an inland bill.

Concerning the implying of fundamental terms where nothing is said and the sale is of a specific thing, such cases usually fall to be decided by reference to the law of mistake, where we find the same arguments concerning the existence or otherwise of "fundamental terms." In *Bell v. Lever Bros.*⁴ the House of Lords told us that there are no underlying assumptions as to quality, description, and the like on the sale of a specific thing, unless the mistake was as to some quality without which the thing would be essentially different. No examples were given as to what qualities would make a thing essentially different, but it is reasonable to suppose that the distinction between pine and mahogany is the sort of distinction referred to, and it is submitted that the inability of a thing to function in the way intended is also a case of breach of an implied fundamental term. It is harder to apply this concept to the sale of a picture, especially when even the experts have difficulty in telling the difference between a Vermeer and a Van Meegeren, and that is perhaps why Lord Atkin said it could not be so applied.

If it be acceptable that, on the sale of specific things, there may be fundamental terms either express or implied, because, in the case of express descriptions, the words used are nothing more than a naming either in confirmation of its appearance, or because it has not been inspected, and in the case of specific things sold without any express description, such description may be implied from the circumstances and may relate to something fundamental, then mistake could apply to a contract relating to specific things and could cover mistakes as to quality, including qualities expressly mentioned, on the basis that there was a mistake as to a fundamental term, distinct from mistakes as to quality where "quality" refers to subsidiary attributes of a thing of a named kind. This makes it possible to justify (suppose we wish to) the decision in *Nicolson & Venn v. Smith Marriott*⁵ (namely the dicta concerning mistake as an alternative ground), and it seems to make possible

³ (1853) 2 E. & B. 849.

⁴ [1932] A.C. 161.

⁵ (1947) 177 L.T. 189.

an explanation of the difficult case of *Varley v. Whipp*,⁶ where specific goods described as "a second-hand reaper nearly new" were found not to be such a reaper, and it was held that there was no performance of the contract notwithstanding that the specific reaper had been delivered. If the words used be taken to be the naming of the kind of reaper, then, since such a reaper was not delivered, section 17 or 18 of the Act would not apply.

CONCLUSION

Summing up, it is submitted that there is a great deal of weighty authority for the proposition that every contract contains a core, a central or main promise, which must be performed, and that clauses designed to free one party from liability for delivering something different will not operate. And the same applies to contracts not concerning sale of goods. The problem is whether "fundamental term" is, as Devlin J. suggests, narrower than the well-known term "condition," and if it is, how to find what the fundamental term is. Accepting Devlin J.'s view, it is submitted that the fundamental basis will have to be discovered by considering the purpose of the contract on an objective basis in the light of the contract itself and what each party may reasonably be supposed to know about the other's needs. Section 13 of the Sale of Goods Act presents a difficulty, and so does *Wallis v. Pratt*, but, on what has been said above, not insurmountable by a court that really desires to surmount them. If the difficulties come to be regarded as too great, then the statement of principle in the *Smeaton Hanscombe* case is wrong.

If the writer may rush in where philosophers love to tread, he may observe that the basis of contract is the achievement of purpose (though it does not have a monopoly of that goal). The law can no more shut its eyes to purpose than a painter can to the colours he is using. Notwithstanding the *caveat emptor* rule, the law constantly considers purpose. It does so the moment it smells the faintest odour of illegality of purpose. But, above all, the whole of the law relating to remoteness of damage is, it is submitted, based on the concept of purpose. When we speak of the loss arising naturally, we have in mind what purpose the reasonable man would expect to have fulfilled by the contract in question, and when we speak of losses in the contemplation of the parties, we are still limiting the loss to what purpose the reasonable man would expect to achieve by reason of the special circumstances. When Mr. and Mrs. Hobbs were put on the wrong train, they failed to achieve the purpose of arriving at the right station and there was a breach of a fundamental term. But this journey did not appear to have the purpose of preserving health from the effects of continuous rain on a person susceptible to influenza, and hence

⁶ [1900] 1 Q.B. 513.

compensation for expenses incurred on that account could not be recovered. If there is any difference in the operation of the rules of remoteness of damage in contract as compared with the rule in tort, perhaps it lies in the fact that a contract-breaker is entitled to have the damages limited to the effects of failing to achieve the agreed purpose intended to be secured by the contract, but the tortfeasor takes a risk what purposes in the life of the plaintiff will be thwarted by the tort.

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EMBEZZLEMENT AND THE DISOBEDIENT SERVANT

EMBEZZLEMENT can be committed only by a servant who has received the converted property from a third person "for or in the name or on account of" his master.¹ Can a servant then embezzle property which he has received in disobedience of the express or implied commands of his master? Students of Kenny will instinctively answer this question in the negative: "A servant," Kenny tells us, "cannot embezzle anything which he obtained by doing an act that was outside the authorised scope of his employment."² He supports his proposition by a series of striking and convincing illustrations based upon the cases of *R. v. Wilson*,³ *R. v. Cullum*⁴ and *R. v. Aitken*,⁵ all of which are considered below. The recent case of *R. v. Davenport*⁶ raises doubts as to the accuracy of Kenny's proposition, and it is the purpose of this article to consider whether and, if so, in what circumstances a servant can embezzle property which he has received contrary to the express or implied instructions of his master.

It will be submitted that, where a servant receives from a third party property which is, or becomes on receipt by the servant, the property of the master, then that servant receives the property for or on account of his master; and that, where this is so, it is immaterial that the servant is acting outside his authority and contrary to his master's instructions. Whether the servant was acting outside the scope of his authority will, according to this submission, be a relevant question only where it has a bearing on the ownership of the property received.

It is convenient to consider the cases in two groups: First, those cases in which the servant has misappropriated the proceeds of some tangible property belonging to his master of which he has wrongfully disposed; and, second, those cases in which the servant has converted to his own use a profit which he has earned by a wrongful use of his master's property.

MISAPPROPRIATION BY A SERVANT OF THE PROCEEDS OF A CHATTEL OF WHICH HE HAS WRONGFULLY DISPOSED

In *R. v. Davenport* the appellant, who was the secretary of a company, received blank cheques signed by two directors of the

¹ Larceny Act, 1916, s. 17 (1) (b).

² *Outlines of Criminal Law*, 16th ed., 265.

³ (1839) 9 C. & P. 27; 173 E.R. 725.

⁴ (1873) L.R. 2 C.C.R. 28; 12 Cox 469.

⁵ (1883) C.C.C. Sess.Pap.XCVII 336.

⁶ [1954] 1 W.L.R. 569; [1954] 1 All E.R. 602; 38 Cr.App.R. 37.

company which it was his duty to countersign and pay to those persons to whom the company wished to make payments. He took four of the cheques and paid them to one Lawrence, to whom he owed money, by filling in the name of the payee as Lloyds Bank Ltd. of which Lawrence was a customer. The appellant used seven other cheques in a similar manner. In addition he disposed of three further cheques by handing them to one Samuel, made out to Samuel's bank, in return for cash and open cheques, which the appellant cashed. He was convicted at quarter sessions on an indictment containing fourteen counts of larceny as a servant of the moneys of which he had caused the company to be deprived.

The Court of Criminal Appeal quashed his conviction in relation to the first eleven cheques because there was no asportation of the money. All that happened was that the company's account was debited with the amount of the cheques. In respect of the three counts relating to the three cheques made out to Samuel, however, the court substituted a conviction of embezzlement of the money and the cheques which Samuel gave to the prisoner. The court did not consider whether Davenport's act was within or outside the scope of his authority but apparently regarded the fact that the money was the proceeds of the master's cheque as sufficient to establish that the money was received for and on behalf of the master. The Lord Chief Justice, delivering the judgment of the court said:

"The appellant got Samuel to cash his master's cheque, and he obtained cash in his hands, bank notes. It follows that that money, as it was the proceeds of his master's cheque, was received for and on behalf of his master and, therefore, he embezzled that money because he applied it to his own uses instead of handing it over."

The *ratio decidendi* appears to be that where a servant wrongfully cashes his master's cheque and receives the proceeds, those proceeds are, necessarily, received by the servant for and on behalf of the master, simply and solely because the cheque was the master's cheque. As authority for the decision the Lord Chief Justice referred to the case of *R. v. Gale*⁷ and said that he could not see any difference in principle between that case and the present: "That case entirely covers the present case so far as the cheques given to Samuel are concerned."

Gale was the head manager of an insurance company. It was his duty to receive at the chief office cheques sent by the managers of the provincial offices, to indorse them if they were payable to his order, and to hand them to the company's cashier, who paid them into the company's bank and accounted for them in the company's books. Gale received two cheques payable to his own order from branch managers and, instead of handing them to the

⁷ (1876) 2 Q.B.D. 141; 13 Cox 340; 35 L.T. 526.

cashier, cashed both through private friends of his own, who gave him cash and paid the cheques into their banks. Gale then applied the money to his own use. It was argued for him that he did not receive the money "for, or in the name, or on account of" his employer. That phrase, it was argued in the Court for Crown Cases Reserved, "must mean that the payer of the money means it for the master, or at least that the servant purports to receive it on account of the master," which was not so in this case. This argument was rejected, Cockburn C.J. saying, "The question is not whether those persons paid on account of his masters, but whether he received on account of his masters. And he did so because it was his duty to pay over the proceeds at once, in whichever way he received them." Lord Coleridge C.J., agreeing with Cockburn C.J., added: "The statute speaks not only of a receipt 'for or in the name of' the master, which may contemplate knowledge in the person paying, but also of a receipt 'on account' of the master, that is, where the servant is bound to account to the master."

Although Lord Coleridge speaks of a duty to account it seems that the prisoner in this case was not merely under a duty to account in the sense in which a debtor must account to his creditor. It is submitted that Gale was under an immediate duty to pay over the actual notes and coins which he received for the cheques, not because he was a debtor, but because that money was his master's money. In *Taylor v. Plumer*,⁸ a case at common law, it was held that the property of a principal which has been entrusted by him to his agent continues to be the property of the principal, notwithstanding any unauthorised changes in the form of the property effected by the agent, so long as the property in question is capable of being identified and distinguished from all other property. "If A is trusted by B with money to purchase a horse for him, and he purchases a carriage with that money, B is entitled to the carriage." If a servant sells his master's chattel, the money which he receives equally becomes the property of his master. Accordingly the proceeds of the cheque, as soon as they were handed over, became the property of Gale's master, and in applying them to his own use, the prisoner was wrongfully converting his master's property.

Before proceeding further it should be pointed out that there were two differences between the cases of *R. v. Gale* and *R. v. Davenport*. First, in *R. v. Gale* the cheques were received by the prisoner from a third party so that, if the indictment had been suitably drawn, he could have been convicted of embezzlement of the cheques themselves. Those cheques were, unquestionably, received for and on behalf of the master, being received in the course of the prisoner's duty and within the scope of his authority. The case might have been put on the narrow ground that the

⁸ (1815) 3 M. & S. 562; 105 E.R. 721.

prisoner had merely changed into another form property previously received for and on behalf of his master, so that the operative receipt was the receipt of the cheques, and not that of the money. But if it had been put on that narrow ground, it would have been of no assistance in *R. v. Davenport* for in that case the cheques were received by the prisoner from his master, so that he certainly could not have been convicted of embezzlement of *them*. The court recognised this difference in the facts of the two cases, but considered it immaterial in principle. It is submitted, with great respect, that this was clearly right, and that the judgments in *R. v. Gale* proceed on the assumption that the operative receipt was the receipt of the money, not that of the cheques.

The second difference, however, was not referred to in the later case, yet there is some authority for regarding it as material. The distinction is that in *R. v. Davenport* the cheques were forged, in *R. v. Gale* they were not. Davenport filled in on signed blank cheques the names of payees to whom he was not authorised to transfer the cheques and, presumably, amounts which differed from those which he was authorised to enter. There is authority for holding that the cheques were, in these circumstances, forged instruments.⁹ Gale, on the other hand, merely endorsed the cheques as he was required to do in the ordinary course of his duty. According to Kenny:

“ . . . if a servant forges a cheque in the name of his master, and cashes it, he does not receive the coins in his capacity of servant, and therefore does not commit embezzlement by making off with them.”¹⁰

The authority relied on for this proposition is *R. v. Aitken*. Aitken acted as book-keeper to the prosecutrix, who sometimes signed blank cheques, leaving Aitken to fill in the appropriate amount and enter it up in the day-book. The prisoner was proved to have filled up three cheques for the amount charged in the indictment, without being authorised by his mistress to do so. It did not clearly appear whether she had previously signed them, or whether he had forged the signatures. The case was therefore presumably decided upon the assumption that the mistress did sign the blank cheques. Aitken cashed them but did not enter them into the day-book or hand over the money to his mistress. *R. v. Gale* is not referred to in the report. The Recorder (Sir Thomas Chambers Q.C.) considered that as the prisoner did not receive the money from the bank in his capacity as servant, *but on forged cheques*, there was no embezzlement. It would seem then, that the case that is on all fours with *R. v. Davenport* is not *R. v. Gale* but *R. v. Aitken*, and the latter case leads to an opposite conclusion.

⁹ *R. v. Hart* (1836) 7 C. & P. 652; 173 E.R. 285; *R. v. Bateman* (1845) 1 Cox 186; *R. v. Wilson* (1847) 2 C. & K. 528; 175 E.R. 219.

¹⁰ *Outlines of Criminal Law*, 16th ed., 265.

However, as *R. v. Aitken* is only a decision of first instance in which it does not appear that *R. v. Gale* was cited, it is important to consider whether the fact that the cheques were forged was, in principle, a material distinction.

If the interpretation put upon *R. v. Gale* in this article is right, this depends on whether the proceeds of a cheque, forged in the manner of the cheques in *R. v. Aitken* and *R. v. Davenport*, belong to the master. If the cheques are the master's property, then, according to this submission, the proceeds are the master's also, and are, therefore, received on his behalf by the servant. Now it seems clear that a cheque so forged is the property of the master. In *Wilson & Meeson v. Pickering*¹¹ an employer handed to his secretary a signed cheque with instructions to fill it up for £2 and to insert the name of the Inland Revenue Commissioners as payees. The secretary fraudulently filled in the cheque for £54 4s. and inserted the name of her personal creditor, one Pickering, to whom she paid the cheque. Pickering obtained payment of the cheque through her bankers, but was held liable in an action for *conversion* and for money had and received, the damages being £54 4s. It seems clear from this case that a cheque forged in the master's name is the master's cheque, at least where the cheque form is the master's and it is signed by him. In that event the proceeds of the forged cheque also belong to the master, and they can, it is submitted, be embezzled by the servant who receives and fraudulently appropriates them to his own use.¹² *R. v. Aitken* seems to be inconsistent with *R. v. Davenport*, and must be considered to be wrong.

At least two propositions seem to follow from the cases of *R. v. Gale* and *R. v. Davenport*:

1. A servant may in some circumstances be guilty of embezzlement even though he was acting outside the scope of his authority in receiving the money alleged to have been embezzled. It seems clear that Gale, in cashing the cheques through his friends, was doing something that he was not authorised to do; indeed Cockburn C.J. said that there was no doubt that he might have been found guilty on an indictment for embezzling the cheques. And it is equally certain that Davenport was acting in disobedience to his master's orders in obtaining cash for the company's cheques instead of paying the company's debts with them: the Lord Chief Justice pointed out that he was guilty of fraudulent conversion of the cheques, and it is submitted with respect that his crime

¹¹ [1946] 1 All E.R. 394. The cheque in this case was crossed and bore the words "not negotiable." S. 81 of the Bills of Exchange Act, 1882, therefore prevented Pickering from getting any better title to the cheque than that of the person from whom she took it.

¹² *Quaere* whether the same result would follow if the master's signature were forged on the master's cheque form, or if the form were not the master's.

was not only this misdemeanour, but also the felony of larceny as a servant.¹³

2. Money may be received "on account of" a third person even though neither the giver nor the recipient of the money intends or expects it ever to reach the hands of that third person. According to Cockburn C.J. it is enough that there is an immediate duty to pay over the money in question; according to Lord Coleridge C.J. it is enough that there is a duty to account.

The cases do not establish, though they are consistent with, the further proposition, the submission of this article, that the duty to account for, or to pay over, the property in question must be a duty arising from the fact that the ownership in that property is in the master and that mere accountability is not enough. This proposition depends upon the second group of cases, but, before turning to these, two further cases in the first group require consideration.

The second of the three cases relied on by Kenny for the proposition quoted at the beginning of this article—*R. v. Wilson*—seems, like *R. v. Aitken*, to be inconsistent with the principles of *R. v. Gale* and *R. v. Davenport*. Edward Wilson was a traveller and it was his duty to take orders from customers, to enter them in the order book and to receive money in the payment of orders. He had no authority to take, or to direct the delivery of, any goods from the shop. One day a customer gave him an order for two items, for which the charges were 6s. 6d. and 4s. 6d. respectively. He entered up the first item only, but his accomplice, Michael Wilson, the prosecutor's carman, delivered both items, and Edward received 11s. for them. He accounted to his master for 6s. 6d. only. He was thereupon charged with embezzlement of 4s. 6d., but the Recorder, after consulting with Patteson J., held that the offence disclosed was not embezzlement but larceny, and directed a verdict of Not Guilty.

"In this case, the servant, having authority to send out goods to the amount of 6s. 6d., puts up goods to the amount of 11s., his intention being to put 4s. 6d. into his own pocket. The time never arrives when he receives that on account of his master, for all that he does is adverse to, and in fraud of, the interest of his master."

Equally, of course, everything that Gale and Davenport did was adverse to, and in fraud of, the interests of their respective masters. It seems to have been assumed that because Wilson stole the goods he could not be guilty of embezzlement of the proceeds; *R. v. Davenport* shows that this is not the case. Wilson's fraud in relation to the goods ought to have been no obstacle to his conviction for embezzlement of the proceeds. Furthermore, the principle of *Taylor v. Plumer* seems to require that the 4s. 6d.,

¹³ Larceny Act, 1916, s. 17 (1) (a).

being the proceeds of the prosecutor's goods, became the prosecutor's property. It might be argued that this principle does not apply in this case because there was no entrusting of the goods to Wilson, as there was of the cheques to Gale and Davenport. But it is clear that the common law right to follow, unlike the equitable doctrine of tracing, does not require an entrusting as a condition precedent to its invocation: "The common law right to follow the property . . . in no way depends upon the recipient being under a fiduciary duty to the beneficiaries."¹⁴ It is immaterial that the property is stolen. As Viscount Haldane L.C. has said: "If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money."¹⁵ Conversely, if a stolen asset is converted into money it would seem that the true owner of the asset ought to be able to claim the money as his own. If, then, the 4s. 6d. became the property of Wilson's master, Wilson was, there can be no doubt, under a duty to hand that sum over, to account to his master for it; and, as he did not do so, he was, according to *R. v. Gale*, guilty of embezzlement. In any event, there is no apparent difference in principle between the proceeds of a stolen and wrongfully assigned cheque, and the proceeds of a stolen and wrongfully sold chattel. The language of the Court of Criminal Appeal in *R. v. Davenport* may be adapted to the facts of Wilson's case: "That money, as it was the proceeds of his master's chattel, was received for and on behalf of his master and, therefore, he embezzled that money because he applied it to his own uses instead of handing it over."¹⁶

The contention that it is sufficient for embezzlement that the disobedient servant receives property which vests in the ownership of his master at the moment that it comes into the servant's possession is supported by *R. v. Read*.¹⁶ The prisoner was employed to look after a wood in which the game and rabbits and the right of sporting had been granted to his master by the owner. He was not authorised to kill rabbits for his own use, but he did take, kill and remove eighteen rabbits with the object of selling them. The capturing, killing and removing were all parts of one continuous transaction. A case was reserved as to whether his acts amounted to embezzlement. It is settled by the decision of the House of Lords in *Blades v. Higgs*¹⁷ that there is no absolute property in animals *ferae naturae* while they are living, but that, at the moment of their death, they become the property of the

¹⁴ Snell, *Principles of Equity*, 194.

¹⁵ In *Sinclair v. Brougham* [1914] A.C. 398, 418.

¹⁶ (1878) 3 Q.B.D. 131; 14 Cox 17; 47 L.J.M.C. 50.

¹⁷ (1865) 11 H.L.C. 621; 11 E.R. 1474.

owner of the soil on which they are killed. If then, the rabbits were dead before they were taken into the possession of the prisoner, he would—according to the submission of this article—have received them on account of his master: but if he captured them and later killed them, then, since he had possession before ownership vested in his master, he would have received them on his own account. The judges were all agreed that the conviction must be quashed, but did not give any reasons for their decision. It is, however, clear from their interjections during the argument that this was the distinction that was present to their minds. When counsel for the prisoner argued that the rabbits were not chattels when taken into possession, Manisty J. said, "It is clear that a dead rabbit is a chattel, and belongs to somebody," and Hawkins J. responded, "But here the prisoner had the rabbits in his possession before he killed them, and the taking, killing and removing them were all one continuous act." Later, when counsel for the prosecution referred to *Blades v. Higgs*, Cockburn C.J. asked, "Suppose the rabbits are taken while asleep?" and Manisty J. added, "Or caught in a trap and taken away alive?" It seems probable then, that the conviction was quashed because the rabbits, not being yet the master's property, were not received on his account.

MISAPPROPRIATION BY A SERVANT OF A PROFIT WHICH HE HAS
EARNED BY A WRONGFUL USE OF HIS MASTER'S PROPERTY

R. v. Cullum is perhaps the best known of a line of cases beginning in 1830 with *R. v. Snowley*¹⁸ in which servants earned money during their hours of employment by wrongfully utilising their master's assets, and were held not guilty of embezzlement. In *R. v. Snowley* the accused was hired by the prosecutor to lead a stallion around the country during the season, and he was instructed to charge 30s. for each mare and was not to take less than 20s. In his account to his master he omitted a sum of 6s. which was the whole charge he had made for covering one mare. Parke J., having conferred with Littledale J., held that this was not embezzlement within the Larceny Act of 1827, which required that a clerk or servant should have received the property in question "by virtue of his employment."¹⁹ Parke J. said, "As it was his duty to take 30s., and not less than 20s., this sum of 6s. was not received by him by virtue of his employment." The learned judge did *not*, however, say that this money was not received on account of the master. Doubt was cast upon the decision in *R. v. Snowley* in *R. v. Aston*,²⁰ in which the prisoner, a brewer's drayman, was entrusted with a quantity of surplus porter which he had authority to sell at the fixed price of 9s. 6d. a dozen. He

¹⁸ (1830) 4 C. & P. 390; 172 E.R. 753.

¹⁹ 7 & 8 Geo. 4, c. 29, s. 47.

²⁰ (1847) 2 C. & K. 413; 175 E.R. 170.

sold a dozen for 6s. to one Webb, but did not receive the money at the time, saying that he would call for it afterwards. Webb told one of Aston's employers of the transaction, and the employer told him to pay the money as agreed. The money was paid over and appropriated by the prisoner. Patteson J., after conferring with Parke B., said that he had great doubts as to the authority of *R. v. Snowley*: and that he and Parke B. considered that, as the master in the present case had authorised the customer to make payment to the prisoner, the master was bound by that payment, and could not demand more of the customer, and the charge of embezzlement was made out. The ratification by the master presumably made the act of the servant an act done by virtue of his employment.

Parke B., however, evidently still adhered to his decision in *R. v. Snowley*. He affirmed his belief in its rightness in *R. v. Harris*.¹ The prisoner in this case, the operator of a mill in the county gaol, was under a duty to direct persons bringing grain to be ground at the mill to obtain at the porter's lodge a ticket specifying the quantity of grain brought. The ticket was then his order for receiving the grain, and it was his duty to grind it, to receive the money for the grinding, and to account for it to the governor of the gaol. Harris received and ground a certain parcel of grain without a ticket, and without directing the person bringing it to obtain one, and applied the money which he received to his own use. He was convicted of embezzlement, but execution was respited until the opinion of the judges could be obtained. It was objected—*inter alia*—that he did not receive the money “by virtue of his employment, nor for or on account of his masters.” Parke B. thought that the question was “whether the omission to require a ticket was a mere neglect of duty, or whether it showed an intention on his part to use the mill on his own account, and not for his employers.” Since it appeared that the prisoner was using the mill for his own benefit, it could not be said that he received the money by virtue of his employment. Again, however, Parke B. expressed no opinion as to whether the prisoner received the money on account of his master. But Pollock C.B., purporting to express the opinion of all the judges, said that, since the prisoner was intending to use the machinery for the benefit, not of his master but of himself, “the money which he received *was not received on account of his masters*,”² and the conviction must be quashed.

The difference between the remarks of Parke B. and the judgment of Pollock C.B. is important because the provision relating to embezzlement in the Larceny Act of 1861³ (s. 68), which superseded the corresponding provision in the 1827 Act, omitted

¹ (1854) Dears. 344; 169 E.R. 753.

² My italics.

³ 24 & 25 Vict. c. 96.

the words "by virtue of such employment." After 1861 Harris could have been convicted even though he did not receive the money by virtue of his employment, if only he had received it on account of his employer. It seems likely that this omission from the definition of the crime was made in order to get rid of the effects of the decision in *R. v. Snowley*. Greaves, in a note on *R. v. Harris* in the fourth edition of Russell on *Crime*⁴ wrote:

"In the Committee of the Lords on the Criminal Bills of 1860, on my reading that case [*R. v. Snowley*] Lord Wensleydale and all the law lords greatly disapproved of it, and unanimously agreed to the propriety of preventing such a failure of justice in future by altering the clause as it now stands, and there is no doubt that it will meet such a case as the present [*R. v. Harris*]." ⁵

But in suggesting *R. v. Harris* to be no longer good law, Greaves seems to have been acting on the assumption that that case turned on the words "by virtue of his employment," whereas, as Blackburn J. pointed out in *R. v. Cullum*, it did not.

In this case the later enactment was considered in the Court for Crown Cases Reserved. The prisoner was the captain of a barge. It was his duty to take the barge to London and to return with such cargo as his master should direct. Cullum had no authority to select the return cargo. On the occasion in question he asked his employer, Smeed, if he should not, on his return, take a load of manure to a Mr. Pye of Caxton. Smeed forbade him to do so and gave him other directions which required him to pass Caxton. Without his master's knowledge the prisoner carried the load of manure in the barge and received, as the freight, £4, for which he did not account to Smeed. On a case stated it was held that this was not embezzlement as the money was not received for or in the name or on account of Smeed. Bovill C.J. seems to have relied—as did the court in *R. v. Harris*—on the intention of the prisoner, as evidenced by his own acts, to earn money for himself, and not for his master: and on the fact that Pye, when paying the £4, did not, apparently, know of the existence of Smeed. Both of these facts, as shown above, were held to be irrelevant in *R. v. Gale*, where the property passed to the master independently of the intention of the servant and the third party.

Bramwell B., however, evidently thought that the money earned became the prisoner's money, for he said, "The wrong committed by the prisoner was not fraudulent or wrongful with respect to money, but consisted in the improper use of his master's chattel." Blackburn J. clearly based his judgment on the fact that the £4 was not the master's property when received by the prisoner. During the argument he asked, "Suppose a private coachman

⁴ Russell, 4th ed., ii, 453.

⁵ Quoted in the report of the argument in 12 Cox 469, 472.

used his master's carriage without leave, and earned half a crown by driving a stranger, would the money be received for the master, *so as to become the property of the latter?*"⁶ In his judgment he said, "The essence of the matter is, that the servant shall be deemed to have stolen the master's property"; and went on to hold that, the servant having acted without authority, the £4 could not become the property of the master.

"The test of the matter would really be this—if the person to whom the manure belonged had not paid for the carriage, could the master have said, 'There was a contract with you, which you have broken, and I sue you on it'?"

This point seems to have turned the scale in the mind of Archibald J. who had had some doubts whether the money earned by the use of the barge might not have become the money of the master:

"But, on reflection, I think that, although carried in the master's barge, yet, as it was against his will, and carried by the servant in his own name, the contract must be taken to have been with the servant so that under these circumstances no action by the owner against the proprietor of the manure could have been maintained; and that there was no receipt 'for' or 'on account of' or 'in the name of' the master."

Honyman J. concurred in the result without giving reasons. Three of the four judges who delivered judgments, then, based their decision on the fact that Cullum's master did not become the owner of the money which Cullum received. Cullum's lack of authority to carry the manure was relevant only in so far as it might have affected the ownership of the money. If it had been the master's contract, entered into on his behalf by his servant, then, presumably the money would have become the master's money. If some reason independent of contract (*e.g.*, the rule in *Taylor v. Plumer*) had caused the property in the £4 to vest in the master, there is nothing in the judgments of Bramwell B. and Blackburn and Archibald JJ. to suggest that they would have felt obliged to acquit him of embezzlement on the ground that he was acting outside the scope of his authority. On the contrary, the implication is that they would have convicted him. This case, then, is no authority for Kenny's proposition.

Were the judges right in holding that the £4 received by Cullum did not become his master's property? Many statements are to be found in the reports to the effect that money earned by an agent in such circumstances "belongs to" or "is the property of" the principal. Thus in *Morison v. Thompson*⁷ where an agent employed to negotiate for the purchase of a particular ship took a secret commission, it was held that the principal could recover it in an action for money had and received; and Cockburn C.J.,

⁶ My italics.

⁷ (1874) L.R. 9 Q.B. 480.

delivering the judgment of the Court of Queen's Bench, said that the agent was under a legal duty "to pay over the amount *as money absolutely belonging to his employer*"; and that, under these circumstances, "the money, *being the property of the employer, can only be regarded as held for his use by the agent . . .*"⁸ It is a little surprising to find Archibald and Blackburn JJ. concurring in this judgment a year after their decision in *R. v. Cullum*. A civil case whose facts approximate more closely to those of *R. v. Cullum* is *Shallcross v. Oldham*.⁹ The master of a ship, who had authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owners' account, as he was unable to procure a remunerative freight, loaded the ship with a cargo of his own. When the master sold the cargo, it was held that he was liable to account to the owners of the ship for all the profits made, and not merely for a proper freight. Page Wood V.C. stated the principle to be: "Where a chattel is entrusted to an agent to be used for the owners' benefit, all the profits which the agent may make by using that chattel *belong to the owner*."¹⁰

If these statements be taken at their face value they invalidate the premise on which *R. v. Cullum* was decided by the majority of the judges, but it seems that they are too wide. In the cases in which they were made it was not necessary to decide whether the agent was under a duty to account to his master as a mere debtor, or as a servant holding his master's property in his possession or custody. The principal was not seeking to recover the wrongful profit in specie, and would recover equally if the agent were a mere debtor. In *Lister v. Stubbs*¹¹ Stirling J. and the Court of Appeal held that the agent who takes a secret commission for transacting his principal's business is accountable merely as a debtor, and that the principal has no claim to the commission—or the property in which it has been invested—in specie. Stirling J. said:

"No doubt the case might have arisen (as in *Taylor v. Plumer*) at law of following the money; but *Morison v. Thompson* was not that case, and no authority has been cited to me in which at law money received under such circumstances has been followed."

Does it make any difference that the person making the wrongful profit is not a mere agent, but a servant?¹² In *Reading v.*

⁸ My italics.

⁹ (1862) 2 J. & H. 609; 70 E.R. 1202.

¹⁰ My italics.

¹¹ (1890) 45 Ch.D. 1.

¹² There is a hint that it does in *R. v. Solomons* [1909] 2 K.B. 980; 79 L.J.K.B. 8; 22 Cox 178; 101 L.T. 496; 25 T.L.R. 747. One of the questions which the Court of Criminal Appeal had to decide in that case was whether a taxi-driver received fares "for or on account of" his employer within s. 1 of the Larceny Act, 1901 (1 Edw. 7, c. 10). Most of the argument was directed to the question whether the driver was a servant and therefore guilty

*Att.-Gen.*¹³ a sergeant in the Royal Army Medical Corps received some £20,000 as the price of driving a lorry from which it was desired (no doubt with good reason) to divert the suspicions of the police. Reading was enabled to do this by virtue of the fact that he was wearing the King's uniform. The Crown seized the money and, on Reading's bringing a petition of right, was held entitled to retain it by Denning J., the Court of Appeal, and the House of Lords. Lord Porter said that "any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act." He went on to discuss the hypothetical problem posed by Blackburn J. in *R. v. Cullum*—though without, of course, advertent to that case:

"Just as in the often-quoted instance of a servant letting out his services and the use of his master's horses for private gain, he is not acting in the course of his employment, he is taking advantage of the position which his employment gives him and for reward so gained he is answerable to his master none the less, . . . though the obtaining of the money is a criminal act."

These dicta cannot, however, be taken to mean more than that the servant is accountable as a debtor for the sum received. The decision of the majority of the House was based upon the fact that the Crown would have had a right to recover the money earned by Reading in an action for money had and received. *Lister v. Stubbs* shows that this does not involve the conclusion that the money was the Crown's money when received. The courts seem to use "servant" and "agent" as interchangeable terms in these cases and it seems probable that, for this purpose, there is no difference between them.

CONCLUSION

It seems clear then that the servant who earns money by using a profit-earning chattel belonging to his master, or otherwise abusing his position as a servant, is accountable to his master as a debtor. It seems equally clear from *R. v. Harris* and *R. v. Cullum* that if the servant converts the money to his own use, he is not guilty of

of an offence under the Falsification of Accounts Act, 1875. Lord Alverstone C.J., however, said: "As to the counts under the Larceny Act, 1901, Mr. Elliott has contended that the appellant did not receive this money on behalf of anyone but himself, but, as the appellant was a servant of this company, it is clear that he was guilty under these counts also." (The case is reported on this point only in the *Law Times* and *Times Law Reports*.)

However, little importance can be attached to this dictum since, in a subsequent case, *R. v. Messer* (1911) 107 L.T. 31, the Court of Criminal Appeal found that in similar circumstances there was evidence that a taxi-driver, who was not found to be a servant, was also guilty under the same section.

¹³ [1948] 2 K.B. 268; affirmed, [1949] 2 K.B. 232; affirmed, [1951] A.C. 507.

embezzlement for the reason that he did not receive it for, or in the name, or on account of, his master. Lord Coleridge's dictum in *R. v. Gale* that accountability is enough cannot be supported; it is inconsistent with the *ratio* of the majority of the judges in *R. v. Cullum*. Those judges required nothing less than that the master should have become the owner of the money. It may well be that the omission of the words "by virtue of such employment" from the Larceny Act, 1861, was intended to make accountability suffice, but, if so, it failed in its object as *R. v. Cullum* shows. *R. v. Snowley* and *R. v. Harris* would, it seems, have to be decided the same way today.

If, however, the property received by the servant does become the master's property, then it appears from *R. v. Gale* and *R. v. Davenport* that it is received on account of the master even though the servant was acting outside the scope of his authority in receiving it. That the servant disobeyed his master's orders in receiving the money is, in itself, no bar to his conviction for embezzlement. It becomes so only where, as in *R. v. Cullum*, it prevents the property received from vesting in the master. Kenny's proposition that the servant must have received the property within the scope of his employment in all cases is not supported by *R. v. Cullum*, and the other two cases on which he relies, *R. v. Aitken* and *R. v. Wilson*, are both first instance decisions of recorders which seem to be inconsistent with the decision of the Court for Crown Cases Reserved in *R. v. Gale*, and that of the Court of Criminal Appeal in *R. v. Davenport*. It is therefore submitted with respect that that proposition is inaccurate.

It is submitted, finally, that there is no distinction in substance between the servant who misappropriates the proceeds of his master's wrongfully sold time and the servant who misappropriates the proceeds of his master's wrongfully sold chattel. The one is as dishonest as the other, and the master is deprived of valuable property in both cases. If the one is guilty of a crime, then it is submitted that the other ought to be guilty of the same crime. There is an independent reason why it is unfortunate that persons like Snowley, Harris and Cullum are not guilty of embezzlement. When a servant has wrongfully disposed of a chattel belonging to his master it will be possible to convict him of larceny or embezzlement of the chattel, depending on whether he received it from his master, or from a third party for his master. Davenport was apparently guilty of larceny, and Gale of embezzlement of the cheques which they appropriated. But Snowley, Harris and Cullum were guilty of no crime in fraudulently misapplying their master's time and chattels, because English law knows no *furtum usus*. When the master's time and assets have produced something tangible, however, there seems to be no reason why the law should not give it that protection with which it safeguards other tangible property. If and when the long overdue revision

of the Larceny Act takes place it is hoped that the draftsman will achieve the object which the 1861 Act failed to attain, and will ensure that servants like Snowley, Harris and Cullum get their deserts. If it be objected that there are difficulties in the way of holding a man liable for conversion of property of which he is, in law, the owner, the example of the crime of fraudulent conversion shows that these difficulties are far from insuperable. Provided that it is clearly established that the servant intended *never* to account to his master for the property received but to deprive him permanently of his interest, the crime of embezzlement could be held to be made out, without, it is submitted, any danger of injustice.

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HOULDSWORTH v. CITY OF GLASGOW BANK

It was in the *Modern Law Review*¹ that Professor Gower, whilst recognising their authority, first asserted that the speeches in *Houldsworth v. City of Glasgow Bank*² appeared to show a confusion between the corporate company and its members and that the reasoning was unsatisfactory. In his recently published book³ Professor Gower reaffirms his dislike of this decision, which he regards as anomalous. This decision, which has the effect that a shareholder who has been induced to subscribe for shares on the faith of a fraudulent statement in a company prospectus cannot sue the company for damages unless he also rescinds the contract of allotment, is, as Professor Gower says, "entirely contrary to the normal rules of the law of contract, for one can recover damages for fraud without also rescinding the contract." Professor Gower considers this exception to the general rule an anomaly caused, in his opinion, by the failure of the House of Lords, prior to the decision of the leading case of *Salomon v. Salomon & Co.*,⁴ to realise that a company is an entity distinct from its members.

He suggests, however, that the decision may be explained away by reference to the concept of a company's share capital as a guarantee fund for creditors. "The conception is at the basis of the rule that a shareholder who wishes to rescind must do so promptly, since the existence of his shares may have led others to extend credit to the company."⁵ But if a shareholder were permitted to recover damages notwithstanding that he had lost the right to rescind, the consequences to third parties would be just as detrimental, since the assets of the company would be equally depleted. Hence the rule that he must act promptly, and unless he does so and rescinds the allotment (thus ceasing to be a shareholder) he will lose all remedies against the company."

With all due respect for Professor Gower, his attempted rationalisation of the case seems unsatisfactory. He says that to allow an action against the company for damages for the fraudulent misrepresentation inducing the share subscription, when it is too

¹ (1950) 13 M.L.R. 367, note 8.

² (1880) 5 App.Cas. 317 (H.L.).

³ *Modern Company Law* (London: Stevens & Sons, Ltd., 1954), at pp. 63-64, 279 and 314-315.

⁴ [1897] A.C. 22 (H.L.).

⁵ I have attempted to show in a review of Professor Gower's book (71 L.Q.R. 415) that, although there is some justification for his view that the rule in *Oakes v. Turquand* (1867) L.R. 2 H.L. 325 is based on the notion that, in granting credit to a company, creditors rely on the company's share capital as a "guarantee fund," this is not in fact the true explanation of the rule.

late to obtain rescission, would be to lead in effect to an easy evasion of the rule as to rescission with great detriment to "outside creditors." In the first place, this explanation can at the most be only a partial one, for while it might explain the refusal of an action for damages when it is too late to obtain rescission, it certainly does not explain why a shareholder, who has just discovered that he was induced by fraudulent misrepresentations (made by the company's agents in the course of their employment) to subscribe for his shares, and who is in a position to rescind, but who wishes to keep his shares and claim damages against the company, should not be allowed to elect against rescission and in favour of damages from the company. Secondly, even as regards the case where it is too late for the shareholder to rescind, it is not correct to say without qualification that the consequences of a claim against the company for damages would be just as detrimental as a claim for rescission "since the assets of the company would be equally depleted." This statement ignores the fact that when rescission is obtained the plaintiff recovers the amount he contributed to the company's assets, whereas this will not always be the case when he contents himself with a claim for damages; for example, he may have paid £1,000 for his shares and the company's assets would be depleted by that amount if he were to rescind; the shares, although without the advantages represented, may still have been worth a considerable amount at the time of their allotment to him, so that, if he claims damages from the company without rescinding, they will amount to something less than £1,000 and the company's assets will accordingly be less depleted than if he rescinds. Finally Professor Gower does not support his argument by reference to anything that was said in the House of Lords in *Houldsworth's* case.⁶

The purpose of this short article is to demonstrate that the decision in *Houldsworth's* case is not an anomaly, that it is quite consistent with the doctrine of corporate personality and that the principle underlying it is not the protection of "outside creditors" (though it will achieve that result incidentally in some cases) but the protection of Houldsworth's fellow shareholders from a claim which was quite inconsistent with his contract with them.⁷

The facts of *Houldsworth's* case were briefly these. Houldsworth bought £4,000 of its stock from the City of Glasgow Bank,

⁶ He does cite in his favour passages from the judgments of the C.A. in *Re Addlestone Linoleum Co.* (1887) 37 Ch.D. 191, 204-205 and 206, but it is difficult to see how they help his argument.

⁷ It may, perhaps, be rather old-fashioned to speak of a company's memorandum and articles constituting a contract between the members *inter se*, but this is the terminology employed by the House of Lords in *Houldsworth's* case, and it is convenient to retain it here. In any case the important point is that these documents regulate not only the relationship between the individual member and the company but also that between the members *inter se*, and it is immaterial for present purposes whether this latter relationship actually amounts to a contract or not.

which was an unlimited company registered under the Companies Act, 1862. In the following year the bank went into liquidation with immense liabilities and Houldsworth was entered on the list of contributories and paid calls. Houldsworth claimed that he was induced to buy the stock by reason of fraudulent misrepresentations made to him by the directors and other bank officials and, since it was too late for him to obtain rescission of the contract of allotment once winding up had commenced,⁸ he brought an action for damages against the company. The damages he claimed were (i) £9,000 odd, the price of the stock and stamp duty; (ii) £20,000, being the amount he had paid on the first call; and (iii) £200,000, the estimated amount of future calls which might be made on him. The House of Lords unanimously held that, assuming the allegations of fraudulent misrepresentation to have been made out, the action failed, because a person, remaining a member of a company, cannot sue the company for damages for fraudulent misrepresentation inducing him to buy shares in the company, though he will of course have his remedy in damages against the agents who made the fraudulent misrepresentations. ✓

On a first reading of the report one is inclined to agree with Professor Gower's strictures on the case. Even though the company's agents had not been authorised by the company to make the misrepresentations, they had made them while acting in the ordinary course of their employment and on general principles one might think that the company should be vicariously liable and that it should matter not at all that the plaintiff remained a member of the company since the latter had an independent legal existence. This first impression is strengthened when one finds Lord Hatherley saying in the course of his speech in *Houldsworth's* case,⁹ "In truth the appellant [Houldsworth] is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself." In fact it is of course very common for a person to be both a shareholder in and a creditor of one and the same company.

On the other hand, however, Lord Selborne said¹⁰: "For many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger; except that he may have to contribute, rateably with others, towards the payment of his own claim. But here it is impossible to separate the matter of the pursuer's [Houldsworth's] claim from his status as a corporator, unless that status can be put an end to by rescinding the contract which brought him into it." Lord Selborne, at any rate, was thus clearly at pains in his speech to stress that, despite the fact that a company has a separate personality and that a

⁸ *Oakes v. Turquand* (1867) L.R. 2 H.L. 325.

⁹ (1880) 5 App.Cas. 317, 333.

¹⁰ *Ibid.* at p. 329.

shareholder may also be a creditor of his company, Houldsworth's claim must nevertheless fail.

Of the four Law Lords in *Houldsworth's* case, Lord Blackburn was content to rely on the authority of the House of Lords' earlier decision in the similar case of *Addie v. Western Bank of Scotland*,¹¹ and it is not easy to deduce from his speech or from those of the noble and learned Lords in *Addie's* case any general principles justifying the refusal of an action for damages against the company. Lord Hatherley's speech also is of little assistance because its central themes are the dictum already cited, which is obviously much too widely framed,¹² and the argument that in all probability there were many other shareholders in the same position as Houldsworth, so that to allow him a remedy in damages against the company would result in a complicated series of inter-lacing claims amongst all the shareholders who had been induced to take shares from the company in circumstances similar to Houldsworth's.

The important speeches are, however, those of Lord Cairns and Lord Selborne and they do provide a satisfactory explanation of the House of Lords' decision. They do not merely rely on the authority of *Addie v. Western Bank of Scotland*, but proceed to discuss the principles at issue.

It was admitted in the course of argument before the House that if Houldsworth, remaining a shareholder, had a right to raise an action for damages against the liquidator after the commencement of the winding up, he must also have had a right before the winding up to have remained a shareholder, and also then to have brought an action for damages. The question for decision, therefore, as posed by Lord Cairns, was "Can a man, induced by the fraudulent misrepresentation of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares and to sue the company for damages?" It was the contention of Lords Cairns and Selborne¹³ that Houldsworth, in urging that the answer to this question should be in the affirmative, was making a claim which was inconsistent with the contract between himself and the other shareholders for the time being, into which he entered on taking the shares and which contract was still in existence. In the words of Lord Cairns, "A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one hundredth part of the capital of the company. . . . His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one hundredth part of all the property of the company,

¹¹ (1867) L.R. 1 H.L.Sc. 145.

¹² It may be that Lord Hatherley, who agreed with the earlier speeches of Lords Cairns and Selborne, was merely seeking to epitomise their conclusions and over-reached himself.

¹³ (1880) 5 App.Cas. 317, 324-325 and 329-330.

and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them, whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. . . . It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company, that is to say, those same assets and contributions, shall pay the new partner damages for a fraud committed on himself by the company, that is, by himself and his co-partners, in inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not be in accordance but at variance with the contract into which the new partner has entered.”¹⁴

It is not, of course, sufficient to say that the claim is inconsistent with the shareholder's contract because it diminishes the amount of the company's assets available for the payment of “outside creditors”; if this were a satisfactory reason, it would equally apply to prevent a shareholder ever succeeding in any action for damages against his company. An illustration will, however, show what Lords Cairns and Selborne had in mind when they said that Houldsworth's claim was inconsistent with his contract with his fellow shareholders.

Suppose X subscribes for one hundredth of a company's issued one class share capital in reliance on the representation made by an agent of the company that the company's assets are £700,000 and its liabilities are £100,000. This representation is false for the liabilities are in fact £500,000 and the company's agent made it fraudulently in the course of his employment. On the assumption that X can, without rescinding his contract of allotment, recover damages for the fraud from the company, the amount of damages to which he is entitled must be included amongst the company's liabilities, so that the company's net assets are less than the amount represented to X by the sum of (£400,000 + the amount of the damages for which the company is liable to X), and the value of X's shares is less than the value which it was represented to him they had by the sum of one hundredth of (£400,000 + the amount of the damages for which the company is liable to X). It is this last sum to which X is entitled if he is able in law to claim damages from the company, and on his receiving

¹⁴ (1880) 5 App.Cas. 317 at p. 324. In this passage the term “partner” is, of course, used in the non-technical sense of “co-adventurer.” The passage also assumes that the company is an unlimited company, as was the City of Glasgow Bank, and that all the shares rank equally.

it he will have obtained a full compensation for the loss he has suffered from the fraudulent misrepresentation.¹⁵

The consequence of X's receiving these damages is in effect the variation of the contract between himself and the other shareholders; his contract is that he will be entitled to one hundredth of the company's assets and will bear the brunt of one hundredth of the company's liabilities, but the effect of his claim for damages against the company is to make him bear the brunt of one hundredth not of the company's liabilities but of the liabilities as he imagined them to be. In electing, however, not to rescind his contract of allotment, X affirms his contract with his fellow shareholders; he must, therefore, abide by it and cannot claim damages for the fraud from the company. "He is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law."¹⁶

It may be objected against this conclusion that a person, who buys goods at a certain price as a consequence of the fraudulent misrepresentation of the vendor, and who, on discovering the fraud, elects not to rescind the contract, can nevertheless sue the vendor for damages, so that he is, by affirming the contract, keeping the goods and yet he is in effect paying less than the contract price. If this is permitted in the case of sale of goods, why should the House of Lords invoke the doctrine of "approbating and reprobating" in the case of a share subscription? The answer is, apparently, that in the case of sale of goods we have only to consider the legal relationship between the purchaser and the vendor, and the latter, who has been guilty of deceit, is not allowed to raise this objection to the plaintiff's conduct. In the case of a share subscription, however, there is, in addition to the legal relationship between the subscriber and the company, the relationship between the subscriber and his fellow shareholders, and the latter, who are not vicariously responsible for the fraud¹⁷ (for the persons who made the misrepresentation are the agents of the corporate entity,

¹⁵ This illustration is based on the example given by Lord Cairns in (1880) 5 App.Cas. 317, 324-325; Lord Cairns, however, in estimating the actual value of the company's net assets (as distinct from their value as represented) omitted to allow for the liability which the company had *ex hypothesi* incurred for the fraudulent misrepresentation.

Having regard to Professor Gower's comments (*Modern Company Law*, pp. 326-327) on *McConnel v. Wright* [1903] 1 Ch. 546, it is interesting to note that Lord Cairns assumed that the measure of damages would be the difference between the value of the shares as represented and their actual value, and not the difference between the price paid and their actual value.

¹⁶ (1880) 5 App.Cas. 317, 325.

¹⁷ If, however, any of them are actual participants in the fraud, the defrauded subscriber will be able to sue them personally for the deceit.

not of the shareholders), can object to the plaintiff's conduct in approbating and reprobating.¹⁸

Certainly, to allow the shareholder, who elects not to rescind his contract of allotment, to obtain damages from the company will in some cases, at least, work grave injustice on his fellow shareholders. Suppose that, in the hypothetical case of X previously given, shortly after X's subscription Y also subscribes for shares in the company, being induced to do so by the representation that the company's assets and liabilities are respectively £700,000 and £500,000. Subsequently, X discovers the fraud practised on him but, electing to affirm his contract of allotment, he remains silent. Later still the company goes into liquidation and X claims damages against the company in the liquidation for the fraud practised on him. Y would be gravely prejudiced if X's claim were allowed, for it would follow that, at the time Y subscribed for his shares, the company's liabilities were £500,000 + the amount of damages to which X is entitled. Y was therefore the victim of a misrepresentation, for which, since it was innocent, the only remedy is rescission. Since the company is in liquidation rescission is now impossible, so that Y is without a remedy.¹⁹ The court, in allowing X's claim for damages against the company, has done so at the expense of the innocent Y.²⁰ Having regard to the possibility of situations such as this, surely it is not unjust to refuse to the defrauded subscriber an action for damages against the company, if the contract of allotment remains unrescinded.

In conclusion it is therefore submitted that the House of Lords, in deciding *Houldsworth's* case, were fully conscious of the

¹⁸ "A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud. . . . But does the same rule apply to the case of shares or stock in a partnership or company? We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. . . . The person called the buyer . . . has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way." (*Per Lord Cairns* (1880) 5 App.Cas. 317, 323-324.)

¹⁹ Even if the company is not in liquidation, so that Y is able to rescind, X's conduct in affirming his contract of allotment and then claiming damages is selfish and reprehensible, for by doing this he gives Y the alternative either of suffering without complaint the loss occasioned by the diminution of the company's assets through paying X's damages or of doing what X is not prepared to do himself, *viz.*, rescinding his contract of allotment.

²⁰ This passage sets out the legal position as it was in 1880 when the House of Lords was called on to decide *Houldsworth's* case. The Directors' Liability Act, 1890, was later passed (see now Companies Act, 1948, s. 43). It is unlikely, however, that in the hypothetical case considered above Y would even now have any remedy; he certainly would have none against the company, and, if (assuming that the misrepresentation was contained in a prospectus) he sued the persons responsible for the prospectus under s. 43, they would presumably have no difficulty at all in proving a defence under s. 43 (2) (d).

company's separate legal personality, that in rejecting Houldsworth's claim for damages against the company they were concerned to protect the position not of the company's creditors but of Houldsworth's fellow shareholders, and that in their decision they were fully justified.

*J. A. HORNBY.

Professor Gower replies:

Mr. Hornby's interesting and learned article has not, I fear, convinced me that I was wrong. That their Lordships in 1880 had not fully grasped the implications of corporate entity, seems to me to be illustrated by the various extracts from their speeches which Mr. Hornby quotes. This, however, is a minor matter. The main point is Mr. Hornby's argument that the decision in the *Houldsworth* case can be justified as a necessary protection for shareholders. Mr. Hornby must therefore establish that if one shareholder were allowed to recover damages for fraud without rescinding, this would cause greater damage to his fellow shareholders than if he were forced to rescind as well. This, as it seems to me, is demonstrably false. Let us take a simplified example based on Mr. Hornby's illustration:

Shareholders A, B, C and D each subscribe at par for 2,000 £1 shares in a company whose net worth is £8,000. Shareholder A was induced to subscribe by fraudulent misrepresentations that the net worth was £10,000. If he elects to affirm the allotment but can sue for damages, then, as Mr. Hornby demonstrates, he should recover, in round figures, £667.¹ This will reduce the company's net worth to £7,333 and the value of each shareholder's interest to £1,833. If, on the other hand, he rescinds and recovers damages, then he would recover £2,500, *i.e.*, his money back (£2,000) plus the difference between the value of what he received (£2,000) and what he expected to receive ($\frac{£10,000}{4} = £2,500$).¹ In that event,

the net worth of the company would be reduced to £7,500 and the value of each remaining shareholder's interest would, once again, be £1,833. Hence, even if the courts adopted Mr. Hornby's method of calculation, B, C and D would be no worse off by allowing A to claim damages without rescinding. If, as I suspect and as Lord Cairns assumed (see n. 15 to Mr. Hornby's article), the courts merely allowed A £500 damages, B, C and D would be considerably better off if A elected for damages without rescission; the value of their interests would merely be reduced to £1,875. And in practice the adverse effect on the prospects of the company; and hence of

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¹ I am assuming, with Mr. Hornby and the House of Lords in the *Houldsworth* case (see Mr. Hornby's n. 15), that the measure of damage is the difference between the price and the represented value.

the shareholders, will obviously be greater if its net worth is reduced by £2,500, rather than by £667 or £500.

Mr. Hornby's final illustration shows what is obvious; that if a shareholder can neither rescind nor claim damages this is best for his fellow shareholders as well as for the outside creditors. Mr. Hornby admits that there is some justification for my view that the barring of the right of rescission is based on the principle of "maintaining the capital," although he prefers to justify it on purely technical grounds of statutory interpretation.² I prefer to find a reason, if possible, for a rule whether it be judge-made or statutory, and the only plausible explanation that I can find is that a shareholder should not be allowed to deplete the company's "capital." When this rule bars both rescission and a claim for damages it certainly makes better sense than in those cases where it merely bars a claim for damages alone. In my example, creditors are clearly damnified to a greater extent if A takes out £2,500 than if he merely takes out £667 or £500. But the theory seems to be that while A remains a shareholder he cannot touch the "capital," but if he elects to rescind he ceases to be a shareholder and becomes a creditor to whom this restraint does not apply. And the practical results are just as absurd under Mr. Hornby's explanation, without as it seems to me, even a plausible theory to justify them.

² 71 L.Q.R. at pp. 416-417.

REPORTS OF COMMITTEES

THE FIRST GENERAL REPORT OF THE MONOPOLIES COMMISSION ¹

THE first nine published reports of the Monopolies Commission relate to investigations into matters referred to it by the Board of Trade pursuant to section 2 of the Monopolies Act, 1948. Each reference of this kind deals with the supply or export of a specified description of goods or the application of a specified process, and in each case the Commission investigate the industry or trade in question.² Action taken by the Government in terms of the Act is confined to the branch of trade or industry which has been investigated. This process of individual reference, investigation, report and Government action has come to be known as the case-by-case method. Its prominent place in the monopolies legislation reflects the general feeling in Parliament in 1948 that monopoly and restrictive practices are not necessarily against the public interest and that therefore cases should be investigated individually and assessed and dealt with on their merits.

However, there is provision for another kind of inquiry and report in section 15 of the legislation of 1948 (Reports on General Questions). This section, which did not appear in the original Bill, authorises the Board of Trade to "require the Commission to submit to them a report on the general effect on the public interest of practices of a specified class, being practices which in the opinion of the Board are commonly adopted as a result of, or for the purpose of preserving" monopoly conditions as defined in the Act.³ There is a proviso that the Board of Trade shall not make such general references "unless they are satisfied that practices of [the specified] class have been dealt with, in relation to goods of particular descriptions, by previous reports of the Commission and that it is expedient that the views of the Commission in relation to practices of that class should be formulated in a general report." The first part of the proviso seems to have been inserted after the Opposition in the House of Commons had stressed the undesirability

¹ Monopolies and Restrictive Practices Commission: Collective Discrimination—A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices, Cmd. 9504, H.M.S.O., 1955. Price 3s. 6d. net.

² The Board of Trade may limit the inquiry to particular practices within an industry or to the supply of the class of goods in a specified part of the United Kingdom. Both these limitations were imposed on the inquiry reported in the Report on the Supply of Buildings in the Greater London Area (1954).

³ Broadly, these conditions prevail when one firm or a group of firms acting together supply one-third or more of the goods in question.

of deviating too far from the idea of detailed investigation of particular cases.

The first reference under section 15 was made in December, 1952. Some months earlier the President of the Board of Trade (Mr. P. Thorneycroft) had explained that the Commission in each of its first four reports (on particular industries)⁴ had found "a complex system of restrictive arrangements affecting distribution, and they all had a strong family resemblance." He added: "Although the four Reports certainly point the way to certain useful generalisations, one cannot found a judgment on those four Reports alone. We need to know within what limits the generalisations hold good, whether there are any exceptional cases in which normally undesirable practices may become innocuous or even desirable, and by what criteria such cases, if they exist, should be judged. All this points to some further general consideration about these practices." He said that section 15 was available for this purpose though the "form in which it has been bequeathed to us . . . is not wholly satisfactory for the purpose."⁵

The referred practices have been classified by the Commission into six categories:

1. Collective discrimination by sellers (refusal to sell except to dealers on an agreed list, and regulation of discounts to different groups of customers).
2. Collective discrimination by sellers in return for exclusive buying (the buyers favoured by discriminatory arrangements confine their purchases to the sellers who favour them).
3. Collective adoption by sellers of a policy of maintaining resale prices or imposing other collateral trading obligations on the buyers.
4. Collective discrimination by sellers to enforce resale prices or other contract terms.
5. Collective discrimination by buyers (without any corresponding obligation on the sellers). This includes organised boycotts of particular suppliers or groups of them.
6. Aggregated rebates, *i.e.*, where a group of suppliers agree to grant quantity discounts on the basis of the customer's total purchases from all of them.

These practices are in operation in many branches of British industry and trade. Sometimes they appear singly, more often they appear in combinations of two or more (*e.g.*, categories (1), (4) and (6)) and not infrequently they are employed in conjunction with other restrictive devices such as price-fixing by manufacturers.

⁴ Reports on the Supply of Dental Goods (1950), the Supply of Cast Iron Rain-water Goods (1951), the Supply of Electric Lamps (1951), and the Supply of Insulated Electric Wires and Cables (1952). The first report was reviewed in *Modern Law Review*, April, 1951.

⁵ House of Commons Debates, July 23, 1952, col. 572. The President did not explain why the section was not wholly satisfactory.

Where encountered in earlier investigations of the Commission into the affairs of particular industries, they have generally (with minor exceptions) been judged to be against the public interest.⁶ It may be added that, with one exception, Government has so far accepted the Commission's conclusions in respect of the practices in question.⁷

The description of the practices and the discussion of the arguments for and against them presented in the main body of the report (Chapters 3 to 7) are admirable and instructive. The treatment is both comprehensive and concise, with frequent illustrative references to particular agreements or arrangements and to arguments brought before the Commission by particular trade associations. Even though rather familiar ground is covered—ground made familiar by the earlier reports of the Commission—the careful reader will nevertheless have much to learn.

A study of the report confirms that competition in many branches of industry has been superseded by a network of privately organised controls. This state of affairs is disquieting both to those who believe that economic activities should be ordered and directed by a freely acting price mechanism reflecting consumer demands and competing producers' responses to them, and to those who believe that some detailed control over industry is necessary but should be exercised by the State.

The ten members of the Commission responsible for the report⁸ failed to agree on the effects, in general, of the referred practices on the public interest. Three members signed a Note of Dissent, being joined in this by one member of the majority group on one point—the assessment of the collective enforcement of resale price maintenance. The failure to reach agreement, while not unique in the history of the Commission, is important in that it reveals wide differences in the general approach to the investigation and control of restrictive practices, and, though to a less significant extent, in

⁶ The findings in earlier reports are reviewed in the general report.

One exception to the disapproval of the practices in question is in the Report on the Supply of Insulin (1952). The manufacturers collectively confine supplies on wholesale terms to dealers on a wholesale list. The Commission did not find that these arrangements were against the public interest. Another exception is noted in footnote 13, below.

⁷ The exception is the Government decision on the Report on the Supply of Electric Lamps (1951). The Commission recommended, *inter alia*, the termination of an aggregated discount scheme on the grounds that it hindered independent manufacturers' access to the market. The Government rejected this recommendation, partly because it thought that the other recommendations, accepted by the Government, would help the independents, and partly because the abolition of the collective discount scheme might harm the interests of the smaller manufacturers in the association. (House of Commons Debates, May 19, 1952, Written Answers, cols. 11–12.)

⁸ In terms of the Monopolies and Restrictive Practices Commission Act, 1953, the chairman of the Commission may direct a group of not less than five members of the Commission to undertake a particular inquiry. The general report is the first report prepared by such a designated group to be published. The amending legislation was designed to accelerate the work of the Commission.

the interpretation of the public interest. Broadly, the majority conclude that "the general effect of each of these practices is against the public interest," and recommend that they should be prohibited by legislation creating "a new criminal offence."⁹ They recognise that there may be exceptional circumstances in which the practices are not against the public interest and give four possible situations in which exemption from the prohibition might be granted after investigation. The minority, on the other hand, "are not prepared to say that the referred practices as they exist over a very wide field of trade and industry are in general injurious to the public interest and should be prohibited and made illegal by statute," even allowing for the exceptions specified by the majority. They recognise that the practices (with the exception of the collective enforcement of resale price maintenance) "may, because restrictive of competition, in certain circumstances be injurious to the public interest."¹⁰ They recommend, therefore, that individual agreements and arrangements should be assessed after "detailed examination of their operation which in our judgment would alone warrant a positive decision that a particular arrangement was operating against the public interest and should be prohibited." In short, they are in favour of continuing the case-by-case method of investigation and remedial action.

The difference in approach needs no emphasis. It is perhaps more helpful to point out that the disagreement between the majority and minority groups does not mean that members of the two groups would necessarily not agree on the assessment of the arrangements in a *particular* industry studied by them. It is of some interest that two members of the dissenting minority are signatories of the most recently published report of the Commission in which it is recommended unanimously that collective discrimination, the collective regulation of resale prices and the use of aggregated quantity rebates should be brought to an end in the supply of certain copper semis.¹¹

⁹ The majority urge that the prohibited practices should be clearly defined, but that "the definition should not be too narrowly drawn, or there would be opportunities for the exercise of ingenuity in evading the prohibition by arrangements falling technically outside its scope but having the same effect as those prohibited." This may possibly have reference to one aspect of the Commission's interpretation of the terms of reference. The view was taken that only agreements and arrangements "which in some way or other involve an obligation (legal or moral) on the parties" could be considered as falling within the prescribed scope of their inquiries, though it was noted that other excluded agreements or arrangements may have the same effects.

¹⁰ The minority specifically exclude collective enforcement of resale price maintenance in para. 256, from which the quotation is taken; but in para. 269 they indicate that they do not say that collective enforcement could never be injurious to the public interest, and their general proposals are to cover this practice as well.

¹¹ Report on the Supply and Export of Certain Semi-Manufactures of Copper and Copper-Based Alloys (1955).

The majority arrive at their general condemnation of the referred practices without having made a special detailed investigation into the operation of these practices in any one industry or into the general circumstances of any industry using these practices. A general reference under section 15 does not require or empower the Commission to probe into all the agreements and arrangements falling within the specified categories.¹² Thus the general report does not contain detailed or specific accounts of the historical development of the practices in any industry in which they prevail; there are also no statistics or discussion of costs, prices and profits of the kind that appear in some of the Commission's individual industry reports. (It may be noted in passing that their relevance for and bearing on the conclusions reached in these reports have not always been clear.) However, in reaching their conclusions they have made use of the material collected by the Commission in past investigations as well as that supplied by many trade associations and others in response to their request for information and statements of points of view.

The majority reach their conclusions by a process compounded of several elements. The arguments put forward in favour of the practices are examined. In some places they are shown to be mutually inconsistent. In others the declared objectives of the practices are shown to be equally attainable by other less restrictive measures. Sometimes it is shown that the attainment of the declared objectives is not assured by the measures as they are implemented. And in many places the majority question the premises upon which the arguments are based, or examine the adverse consequences of the practices which are naturally not usually considered in *ex parte* statements. Thus in addition to examining the validity and bases of the arguments put forward in favour of the practices, they also present an economic analysis of the practices. (In connection with collective enforcement of resale price maintenance they also stress the undesirability of private trade courts, as these have come to be popularly known.) In this general examination it is demonstrated that "all the types of agreements which we have examined do adversely affect the public interest, some to a considerably greater extent than others." In this demonstration much emphasis is placed, *inter alia*, on the effect of some or all of the practices in denying consumers a choice between alternatives, in hindering experimentation in business policies and practices by manufacturers and dealers, and in impeding the business of excluded competitors.

The general condemnation of the practices follows logically; but the majority are careful to add that there may be special

¹² For its investigations under s. 2 of the Act the Commission is empowered to require individuals to give evidence, to produce documents, or to render returns. These powers are not enjoyed in respect of general inquiries under s. 15.

circumstances when the use of some of the practices may be justified in the public interest. They qualify this by stating that "we have not in the course of our inquiry come across any instances in which we were clearly satisfied that such practices were beneficial," but concede that they were not able, for example, to examine the more complex arrangements of which the referred practices sometimes formed only a part. Thus they recognise the possibility of exceptional circumstances and list four situations in which the general prohibition might be waived.

The first two categories of exceptional circumstances refer to situations in which the practices may be found to achieve a desirable objective (*i.e.*, one considered to be in the national interest by the Government) where alternative methods (such as direct Government intervention) may not yet have been applied or where they may be impracticable. The first refers to the maintenance of standards of service (*e.g.*, in the sale of dangerous goods) where the consumers cannot judge the need for or quality of the service.¹³ The second refers to the exclusion or limitation of imports by the practices to protect an industry which it is in the national interest to protect.¹⁴ The remaining two categories of exceptional circumstances arise out of the presence of other restrictive practices; either the referred practices may be desirable to bolster up another restrictive practice where it is found to be in the public interest, or they may be desirable to offset the undesirable effects of another restrictive practice. More specifically, the third category covers situations in which the referred practices are necessary to support manufacturers' agreements to charge common prices, and where these agreements, after inquiry, are found to operate in the public interest.¹⁵ The fourth situation is "where the [referred] arrangement is a necessary means of enabling smaller concerns in a trade to compete

¹³ An example is provided in the Report on the Supply of Insulated Electric Wires and Cables (1952). A collective agreement whereby supplies of certain cable were not made available on trade terms to retailers and industrial users who did not employ qualified staff was not condemned by the Commission on the grounds that the restriction was "a prudent if perhaps over-stringent precaution."

¹⁴ Thus exclusive dealing or aggregated rebate arrangements when practised only by domestic manufacturers can have the effect of impeding the entry of foreign goods.

¹⁵ The Commission were not asked to examine price agreements, hence this provision for possible exceptions.

The majority qualify their recommendation by stating that *exclusive-dealing* arrangements should not be excused on the grounds of the desirability of an associated common price agreement. They also state that the arguments against common price agreements are strongest when outside competition is weakest, and that aggregated rebate systems impede outside competitors and reduce the incentive of members to break away.

It may be noted that in earlier reports the Commission have condemned certain common price agreements, left some undisturbed, and recommended public and semi-public supervision or control of others. The Board of Trade has now referred the practices of common price agreements and collusive tendering to the Commission for report under s. 15. (House of Commons Debates, November 2, 1955, Written Answers, col. 125.)

effectively with a very large concern in that trade which is itself resorting to restrictive practices.”¹⁶

It should be noted that a favourable assessment, for example, of an industry's technical achievements or record of (non-restrictive) co-operation would not by itself justify its exemption from the prohibition recommended by the majority; in the language of current American debates on anti-trust policy, there is no general “performance” test to be applied in granting or withholding exemption.¹⁷ On the other hand, the condemnation of the practices does not go the whole way and allow for no exceptions. But the majority clearly do not think that many industries would be able to establish a *prima facie* case for exemption in terms of the specific criteria they lay down. They propose that the four categories of possible exceptions should be set out in the proposed legislation prohibiting the practices generally, and that an “independent body” should examine whether particular arrangements fall within one of these categories and whether they operate in the public interest. The Minister responsible would make his decision after obtaining the advice of this body; any exemptions granted would be by way of parliamentary order, and would be subject to any qualification thought necessary, and with provision for periodic review.¹⁸

The majority recognise that, if their recommendations were implemented, some business practices would be permissible when employed

¹⁶ No example is given. The description could cover a situation where a group of small firms combine to practise exclusive dealing or aggregated discount arrangements to compete more effectively against a large firm which uses its own exclusive dealing or discount terms to tie customers to it.

The President of the Board of Trade has suggested an example of a different but related situation which is not in the majority's list. This concerns an agreement among a group of buyers not to buy from suppliers who practice level tendering. This would not be necessary to protect the smaller competitors of the firms in the level-tendering ring, but might stimulate more competitive conditions in the supplying industry as a whole.

The particular example taken by the President, *i.e.*, of an agreement among local authorities, would not have fallen within the terms of reference of the inquiry, since this was restricted to agreements among “suppliers of goods.”

¹⁷ In some of its earlier reports (*e.g.*, on the Supply of Electric Lamps and the Supply of Insulin) the Commission have been favourably impressed by the record of the industry and this appears to have influenced their recommendations in particular cases (*e.g.*, recommendations concerning price agreements). But this consideration has not inclined the Commission more favourably towards the referred practices (examined in the general report) when previously encountered in investigations under s. 2.

¹⁸ The majority report has been criticised in Parliament and in the press on the ground that the proposal for prohibition with possible exemptions would in practice amount to no more than a proposal for case-by-case investigation, since all or most industries would apply for exemption and have to be considered individually. But even if this were true—and it is not obvious that most industries would be able to establish a *prima facie* case for consideration for exemption in terms of the criteria specified by the majority—the majority's proposals would be more far-reaching than the minority's, since the latter appear to contemplate other grounds for justifying the continuance of the referred practices in addition to those stipulated by the majority.

by one firm but illegal when collectively employed by a group of firms. The terms of reference limited the investigation to collective practices only. Thus it would be in order, say, for a large firm to have a quantity discount scheme with effects similar to those of an aggregated quantity discount scheme, or for it to practise exclusive dealing with effects much the same as those of the collective practice of exclusive dealing. In a sense the prohibition of the *collective* practices would tip the scale in favour of the large, dominant firms who could do alone what their smaller competitors could do effectively only in combination.¹⁹ If, therefore, nothing is done about the restrictive practices of individual firms, there may be a tendency for the relative position of dominant firms to be improved; there may also be an added incentive to mergers, its strength varying greatly from one industry to another. But the recognition of these possibilities does not weaken the case for the majority's recommendations. It merely points to the conclusion that those responsible for monopoly policy must be prepared to deal with possibly adverse indirect consequences of the course favoured by the majority. Inquiries by the Commission under section 2 of the Act could, of course, be used to examine adverse developments if they should occur to any significant extent.

The general issue arising from the limited terms of reference crops up most prominently in the treatment of resale price maintenance in the report. The Commission interpreted their terms of reference to mean that they should not be concerned with the effects or desirability of resale price maintenance *per se*, nor with the enforcement by an individual manufacturer, unaided, of his own resale price stipulations. The report therefore deals with the effects and desirability of collective enforcement alone.²⁰

¹⁹ The fourth exception listed by the majority (p. 68, above) could be interpreted to mean that the referred practices when employed by smaller firms might be exempted from the ban if they are "necessary" to offset the effects of the same type of practice carried on by a large firm on its own.

²⁰ The general reference could presumably have been made wider to include individually enforced resale price maintenance. When the reference was made in December, 1952, the Commission had already "dealt with" this practice in two previous reports, *viz.*, the Reports on the Supply of Electric Lamps (1951) and the Supply and Export of Matches and the Supply of Match-Making Machinery (signed in October, 1952, published 1953), though in the last-mentioned report the brief discussion dealt with past events and with price maintenance at the wholesale level only.

Though the Board of Trade was responsible for limiting the scope of the inquiry to collective enforcement, the President (House of Commons Debates, July 13, 1955, col. 1944) has nevertheless criticised the majority report "on a point of substance," *i.e.*, the "absence of a solution . . . to the question of individual resale price maintenance, part of category IV." He stated that "perhaps it was outside the terms of reference to find a complete one." The use of the words "perhaps" and "complete" is not happy, since, should there otherwise have been any doubts about the scope of the inquiry, clause 5 (a) of the terms of reference specifically excludes "agreements between a particular supplier . . . and the purchaser . . . of those goods to which no other persons are parties." The President's criticism is all the more difficult to understand because, while the Commission are required by statute to consider remedial or preventive measures in their inquiries under s. 2, s. 15

The majority acknowledge and explain that individual enforcement may be more difficult and expensive than collective enforcement, and that individual enforcement is easier for larger firms than for smaller ones. The difficulties of individual enforcement arise partly because it is "very doubtful whether a manufacturer can enforce a contractual obligation against a retailer with whom he has no direct contract." A change in the law could be made to meet this sort of difficulty; on this point the majority state that whether the law should be altered to facilitate individual enforcement "must depend mainly on an assessment of the general effects of resale price maintenance," which was outside the prescribed scope of their inquiry.^{1, 2} But even though such an assessment is not provided by them, they recommend that collective enforcement should be prohibited partly because it makes the practice of resale price maintenance "more rigid and more widespread" than it would be "if individual suppliers were responsible for their own enforcement even if enforcement in the courts were made much easier than it is at present."³ The minority, on the other hand, argue that if it is to be permissible for manufacturers to prescribe resale prices, the most effective method of enforcement—collective enforcement—should not be prohibited, and add that "to forbid

merely requires an expression of the "views" of the Commission. (The minority group observe that "it may be significant that s. 15 of the 1948 Act does not specifically authorise the Commission to make recommendations." And the Attorney-General, though welcoming the fact that it was done, observed that in making recommendations both groups "went outside their terms of reference.")

¹ In their earlier reports the Commission, while recommending the prohibition of collectively enforced resale price maintenance, have never urged that individual price maintenance should also be banned. The Lloyd Jacob Committee (1949), which considered the problem of resale price maintenance as a whole, recommended that individual price maintenance should be permitted, but in a radically modified form. Their proposals, if implemented, would result in a completely different practice from that now known as resale price maintenance, since it would have to allow retailers considerable freedom to sell at lower prices than those stipulated by manufacturers. The proposed modifications are almost invariably neglected in public discussions of the Lloyd Jacob Report. The proposal for modifications is probably impracticable; but this does not excuse its neglect, for this gives rise to the misleading view that the Lloyd Jacob Committee "favoured" individual price maintenance as we know it.

² Though stating that the subject of resale price maintenance in general terms was outside the terms of reference, the majority nevertheless seem to lend their authority to the view that extreme forms of retail price competition, and loss-leader selling, may damage the interests of manufacturers of branded goods (para. 171 and especially para. 238). (This is somewhat qualified in para. 134.) This widely held and influential argument in favour of resale price maintenance is perhaps most remarkable for the lack of documentation in support of it. It is therefore regrettable that the majority provide no evidence or analysis on this point, which is introduced in what are *obiter dicta*.

³ In this approach an "assessment" of the general effects of resale price maintenance seems to be implicit, *viz.*, that the practice is against the public interest if it is as "widespread" as it is today and that a reduction is desirable. It is difficult to see how an assessment of the practice could have been avoided if the majority wished to make recommendations concerning the most effective method of enforcing price maintenance.

collective enforcement . . . favours the large manufacturer." And again, while the majority are abhorrent of extra-legal sanctions and action taken by trade bodies against non-members, the minority (which includes two lawyers)⁴ believe that "public uneasiness" about trade courts is not "well-founded" and that "the evidence goes to show that considerable trouble is taken to ensure that their procedure is fair and in conformity with the law."

We turn now to the more general points presented in the minority's Note of Dissent. The minority conclude that the "evidence and information put before us" do not justify their colleagues' "sweeping" condemnation of the referred practices. It is not clear whether in their view the evidence and information were inadequate (in the sense of not referring to all instances of the practices and their surrounding circumstances), or whether the available evidence did not support any general conclusion. They wish to avoid any general prohibition, since industries should not be deprived of the benefits of the referred practices "without having an opportunity of having their cases examined individually." They add that a general prohibition is inflexible, which is undesirable, since "a practice which today is thought contrary to the public interest may in tomorrow's [changed economic] conditions appear justifiable." The majority therefore recommend what the majority had considered and rejected, *viz.*, that agreements and arrangements of the kinds examined in the report "should be put into writing and registered with the Board of Trade or some other authority." Apart from the salutary publicity it would entail, it would enable the Board of Trade (presumably) to select particular agreements or arrangements for "detailed examination."

The Government has indicated the general line of approach it intends to follow; but it is best to give merely a brief outline since the only announcement of its proposals to date is vague and changes may be made in the process of translating them into a statute.⁵ Legislation is to be introduced to provide for the registration of classes of agreements or arrangements to be prescribed from time to time, and unregistered agreements would be illegal and unenforceable. A "tribunal" is to be set up to examine whether particular agreements on the register are against the public interest. If it is decided that an agreement is against the public interest, it will be rendered illegal (but not "criminal") and its continuance stopped by injunction. It is not clear whether the tribunal will be a judicial one, whether its decisions will be final, or whether it will be given a clear indication of the criteria by which the public interest is to be judged.

⁴ On this point the minority consisted of four of the ten members of the group.

⁵ The proposals are outlined in House of Commons Debates, July 13, 1955, and House of Lords Debates, July 27, 1955.

In the main the proposals tend in the direction indicated by the minority members of the Commission.⁶ But on one subject the Government has declared itself against the conclusions of the minority. It plainly does not like the private trade courts or tribunals. The Attorney-General has indicated that it would be possible to prohibit private trade courts if effective methods of enforcement of resale price stipulations could be found not requiring their help, and suggested that "non-signer" arrangements may be the answer (*i.e.*, to make a manufacturer's resale price stipulations legally enforceable and binding on all wholesalers and retailers, whether parties to a contract or not, who are aware of them). He added that if no alternative method of effective enforcement were found, "we must secure adequate supervision and control over the exercise of [collective] sanctions."

In summary, if the Government proposals are implemented, there will be no serious departure from the case-by-case method in monopoly investigation and control which has been in operation since 1948,⁷ and there will be no new category of criminal offence. The registration of prescribed classes of restrictive practices will be introduced, following a practice long established in some countries such as Sweden. There will also be a new body to investigate restrictive practices, and this may require a "shifting of the emphasis of the work" of the existing Monopolies Commission. If the tribunal is to be a judicial one, the judiciary would be brought back to assist in the appraisal and control of restrictive agreements;

⁶ The President of the Board of Trade has stated recently that the action which he had announced on July 13 "goes somewhat further than the majority report" (House of Commons Debates, November 3, 1955, col. 1189). This presumably refers to the fact that it was stated that classes of practices other than those examined by the Commission could be prescribed for registration. It can scarcely refer to more fundamental matters at issue, for the majority's main proposal to create a new criminal offence was rejected, and no assurance was given that the proposed tribunal would be required to assess the effects of the practices on the public interest within the narrow limits of the four grounds for their justification listed by the majority.

⁷ The Attorney-General recognised that the Government's proposals envisaged a "variant" of the case-by-case approach.

It has been suggested that there will be two main differences between the case-by-case method to be followed by the new tribunal and that followed by the Commission in its inquiries under s. 2 of the Act. First, much emphasis has been put on the proposal that the onus of showing that its practices are not against the public interest will be placed directly on the trade association (or concerted group) appearing before the tribunal. But this language is not helpful. It is difficult to see what more can be required of the trade association than to put its case and argue against possible objections to its practices—and this is already done before the Commission in investigations under s. 2 of the Act. (Of course, the tribunal may be required to hear argument only on specific and limited points, and this would shorten its inquiries as compared with those of the Commission. But no assurance has been given that such limitation will be imposed.) Secondly, the tribunal will not have to establish the facts about the agreements since these will be registered. This may speed up the proceedings, though the tribunal would presumably still inquire into the *working* of the agreements and into the facts of other associated but unregistered agreements and arrangements.

judges would be called upon to engage in a sphere of activity which, gauging from past experience and statements, many of them found incongenial and in which they disclaimed special competence or knowledge. The trade courts which at times have aroused considerable public indignation will either be prohibited or placed under official control or supervision. Finally, it is possible that the American practice of allowing a manufacturer to take legal action for infringement of resale price stipulations against a subsequent seller with whom he has no contract may find its way into English law. Thus even though the basic case-by-case method in monopoly matters is not to be altered, a sizeable crop of innovations may follow from the first general inquiry of the Monopolies Commission, carried out in terms of a section of the Monopolies Act which was added at a late stage of its birth almost as an afterthought. But it will nonetheless be a different crop from that planned more drastically by the majority group of the Commission, and the relatively unimportant prohibitions of certain types of agreements in the cinematograph films industry and among dealers at auctions will remain, for the time being, the only bans on restrictive practices on the statute book.⁸

B. S. YAMEY.*

Postscript

Another report, on the Supply and Export of Pneumatic Tyres, has been published since the above was written. In this report the majority of five members recommend, *inter alia*, the termination of certain collective discriminations and the prohibition of both collectively and individually enforced resale price maintenance; the majority group includes the member who joined the minority group in "defence" of collective resale price maintenance in the general report. The opposite view is taken by a minority group of four members which includes two members who signed the minority report on the general investigation.

There is also a unanimous conclusion that an aggregated rebate scheme in the sale of giant tyres does *not* operate against the public interest, because all tyre manufacturers are parties to the scheme, which therefore does not harm any competitor, and which, further, is not rigid in form. It may be noted that the main circumstance—

⁸ Cinematograph Films Act, 1938, ss. 17–20; Auctions (Bidding Agreements) Act, 1927.

There is also the Monopolies and Restrictive Practices (Dental Goods) Order, 1951 (S.I. 1200), which prohibits certain collective practices (of the kind dealt with in the general report) in the supply of dental goods. This Order, the only one to be issued under the Monopolies Act, 1948, followed the first report of the Commission.

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the fact that *all* competitors are in the scheme—is not taken into account in the list of possible situations qualifying for exemption from the general prohibition recommended by the majority in the general report. The conclusion on this point in the Report on Pneumatic Tyres is signed by four members of the Commission who also signed the majority report on the general inquiry.

NOTES OF CASES

RECENT DECISIONS IN BANKING LAW

THE main interest of *Welch v. Bank of England* [1955] 2 W.L.R. 757; [1955] 1 All E.R. 811 is the criticism which it contains by Harman J. of the much discussed decision of McNair J. in *Brewer v. Westminster Bank Ltd.* [1952] 2 All E.R. 650. The facts of the case were rather complicated but for the purposes of this note they may be summarised as follows.

The plaintiff was one of two trustees who were registered as joint holders of certain consolidated stock transferable by the defendants in their books in the ordinary way. The other trustee by a series of transactions, in the course of which he forged the plaintiff's signature to a number of deeds of transfer, disposed of the stock to third parties for his own benefit and the defendants accepted the transfers as genuine, and registered the said third parties in their books as having become the owners. These frauds were eventually discovered and the fraudulent trustee having died the plaintiff brought these proceedings against the defendant bank claiming that her name should be restored to the register as owner of the stock in question. Similar questions arose in connection with dividends received upon the stock and cheques received in payment for the stock, but these do not need separate consideration here.

The plaintiff's claim rested on the well-known rule that forgery being a nullity the defendant bank had no authority on which they could properly alter the register of stock holders and transfer the stock into the name of the third parties (*Davis v. Bank of England* (1824) 2 Bingh. 393). The defendant bank contended that as the interest of the plaintiff and her co-trustee in the stock was a joint one she could have no better right to complain than he had. They relied also upon estoppel and ratification.

With regard to these latter contentions the circumstances attending the different forgeries varied somewhat and gave rise to interesting discussions as to the precise conduct which will found estoppel or amount to ratification in such cases, but there was no particular difficulty as to the rules involved and this part of the case need not concern us further. In the result the learned judge held that in respect of a large amount of the stock in question the defendant bank were liable to restore the plaintiff's name to the register of stockholders.

It is with the defendant bank's contention on the point of joint interest of the two trustees that I am concerned in this note. This was considered by the learned judge to raise the defence which

succeeded in the *Brewer* case (*supra*), the facts of which it may be useful to recapitulate shortly. The plaintiff Miss Brewer was one of two executors of her father's will and together with the other executor opened a joint account with the defendant bank, on the terms of the bank's standard form of mandate. This mandate provided that cheques upon the account were to be signed by both parties to it, and that the liability of the executors to the bank on the account should be joint and several. The plaintiff's co-executor forged her name to a number of cheques which he drew upon this account and by this means obtained and used for his own purposes a substantial sum of money belonging to the plaintiff which it was claimed in these proceedings that the defendant bank were liable to repay to her.

The forged signatures were so skilfully executed that no question of negligence on the part of the bank arose, and the plaintiff's case in effect was that since the forged mandates were nullities in law the defendant bank must restore the amount paid away or alternatively had no authority to debit the account. To which the defendant bank replied that since she was one of two joint creditors on a single obligation she could not sue without joining her fraudulent co-executor: this she accordingly did. She was then faced with the dilemma that several persons cannot sue at law jointly unless each one is in a position to sue (*Brandon v. Scott* (1857) 7 E. & B. 234) which it was clear the plaintiff was not, for her right was indivisible from that of her fraudulent co-executor. McNair J. considered that this was the correct view of the matter, and gave judgment for the bank.

In regard to this judgment Harman J. in the instant case remarked shortly "I confess that I do not follow that decision. None of the cases in equity were cited to the judge. It may be, however, that this would be a good defence at law. It is certainly, I think, no defence in equity."

It would appear from this statement that there is some well-known rule of equity which applies in cases of this kind but which had been overlooked not only by both judge and counsel in *Brewer's* case but also by the several learned commentators who discussed that case in the periodicals (*cf.* 16 M.L.R. 232). Harman J. does not indicate what the rule he has in mind is, and if we examine the four cases to which he refers in this part of his judgment we find that two of them are in fact the decisions of common law courts (*Davis v. Bank of England, supra*, and *Coles v. Bank of England* (1839) 10 Ad. & El. 437), which in the other two cases (*Sloman v. Bank of England* (1845) 4 Sim. 475 and *Barton v. North Staffordshire Ry. Co.* (1888) 38 Ch.D. 458) courts of equity followed. The principal point relied upon in all these cases was that the forged transfers were nullities; the result being that there was no authorisation to the defendants to transfer the stock out of the plaintiff's name and in each case there was an order to them to

restore it. It is not clear why if at all this should follow in equity rather than in law, though it is true that in *Barton's* case Kay J. does get to the edge of the point which weighed so much with McNair J. in the *Brewer* case: he said (at p. 465) “. . . the suit may be said to be the same as a suit by or in the name of Thomas (the fraudulent executor and joint holder of the stock in question) and Ann (the married executor and joint holder of the stock) Barton. One of two joint owners having forged the name of the other to transfer, the two then come to say those transfers are nullities. Doubtless they are; but could Thomas Barton be heard to say so, and, if not, how does this estoppel affect Ann Barton? I apprehend that the answer is that in equity Ann Barton has sufficient interest to enable here to sue, making Thomas Barton a defendant.”

But if this is a rule of equity it is a procedural rule and it is one which was fully accepted in the *Brewer* case where the fraudulent executor was in fact joined, and which in any event has in reality been displaced since the advent of R.S.C., Ord. 16, r. 11. The difficulty in that case was that the plaintiff being a party to a joint contractual obligation which is an indivisible unity could not enforce it in the circumstances of her co-contractor having already received performance. This point was not mentioned, let alone discussed in any of the four cases relied upon by Harman J., nor even by that learned judge himself in the course of his judgment which provides no evidence that he appreciated the considerations which weighed with McNair J.

This does not mean that I regard the decision in *Welch's* case as mistaken—quite the contrary, it followed clear precedent. These precedents, however, simply established that in circumstances of this kind the property is not divested from the original owners, who are accordingly entitled to have their names restored to the register. My point is simply that the case does not provide any method of getting round or over the decision in *Brewer's* case which was concerned with a problem in contract.

And this was the view of Devlin J. in the later case of *Baker v. Barclays Bank* [1955] 1 W.L.R. 822. The facts here were still wider apart from those in the *Brewer* case, and the decision itself is not of great interest apart from the one point to which I have referred. The plaintiff and one Bainbridge carried on business in partnership under the firm name, “Modern Confections.” Bainbridge received a number of cheques made payable to “Modern Confections” and indorsed them over to one Jeffcott, a friend of his who paid them into an account which he had with the defendant bank. It was within the authority of Bainbridge to indorse cheques with his own single signature, but on the occasions which gave rise to this action he did so not for the purpose of the firm's business, but fraudulently in order to obtain the money for himself.

In these circumstances Devlin J. had no difficulty in finding that the fraudulent partner had been guilty of the conversion of the cheques in question; the fact that he was co-owner of them did not prevent this (*Wilkinson v. Haygarth* (1847) 12 Q.B. 837). The bank having dealt with these cheques and passed them through Jeffcott's account was therefore *prima facie* guilty of conversion also. They argued, however,

- (a) that whatever the result of the fraudulent partner's conduct as between himself and the plaintiff, his indorsement being within the scope of his authority was effective to pass the property in the cheques. This argument was rejected on the simple ground that Bainbridge had neither acted nor purported to act as agent of "Modern Confections"—indeed the defendants had been told that he was the sole owner of that business;
- (b) that they had taken the cheques as holders in due course. This argument was rejected on the facts: they had taken the cheques as agents for collection. If and so far as they were entitled to rely upon Jeffcott's title, which in the circumstances of the case was more than doubtful, this did not help things, as the learned judge was not prepared to find that Jeffcott was himself a holder in due course;
- (c) that they were protected by section 82 of the Bills of Exchange Act, 1882. As to this the learned judge held that there had been negligence on the part of the defendant bank which disentitled them from relying upon this defence;
- (d) that the plaintiff could not properly bring the proceedings without joining the fraudulent Bainbridge. It was here of course that the learned judge came to consider *Brewer's* case and the observation made upon it by Harman J. in *Welch's* case. He had no difficulty in distinguishing the two cases and did so on the lines suggested in the above argument, pointing out that McNair J. in *Brewer's* case was "not dealing with an action by one of two co-owners based on a right of property, but with an action by one of two joint contractors based upon a breach of contractual duty."

C.

DO OCCUPIERS OF LAND OWE A LOWER DUTY THAN NON-OCCUPIERS?

IN a series of case notes¹ in this journal I have sought to show that the law relating to liability for injuries suffered by one person on the land of another might be "rationalised" by employing the

¹ *Dunster v. Abbott* (1954) 17 M.L.R. 265; *Davis v. St. Mary's Demolition Co., Ltd.* (1954) 17 M.L.R. 368; *Slade v. Battersea Hospital Committee, Randall v. Tarrant* (1955) 18 M.L.R. 395.

concept of "active negligence" used in the American *Restatement*. The distinction between "active negligence" and "passive negligence" is thought by both Marsh and Newark to be recognised by English authority, and it is identical with the distinction drawn by Denning L.J. in *Dunster v. Abbott* [1954] 1 W.L.R. 58 between "liability for current operations" and "liability for static condition of premises." Many years ago I asserted that this was the true basis of the distinction between *Addie v. Dumbreck* and the *Wire Rope* case. My previous notes have sought to show that the distinction was also supported by the cases on which I commented.

One consequence of this "new" doctrine is to deny that there is, generally speaking, any difference between the duties owed in respect of acts done on land by occupiers and non-occupiers. The "traditional" approach confuses liability for acts done on premises with liability for the condition of premises, and subjects them both to the *Indermaur v. Dames* rules. This leads to the conclusion, absurd in most circumstances, that the liability of an occupier is lower than that of a non-occupier. In my note on *Davis v. St. Mary's Demolition Co., Ltd.* I regarded Ormerod J. as making an "advance" from the traditional position, because he showed "awareness of the arbitrary character of this distinction." He said "I think any distinction which puts a defendant who is not in occupation of land in a different position from the occupier of land is one which must be considered with very great care and caution." In *Creed v. J. McGeogh, Ltd.* [1955] 3 All E.R. 123,² Ashworth J., who followed the reasoning in *Davis's* case, quoted this dictum but added—"It seems to me, however, that there is no escape from the conclusion that, as the authorities stand, the distinction referred to by Ormerod J. does exist" (p. 126 D). I respectfully dissent from this view, and submit that the reasoning Ashworth J. was compelled to adopt in order to make the defendants liable is a *reductio ad absurdum* of the doctrine he applied.

The Corporation of Birkenhead was making new roads in its suburban territory, and the defendants were the contractors who actually constructed the roads and footpaths and put in sewers. Their method was to lay the road for quite a distance and then return, put in the sewers and complete the footpaths over them. They used a trailer to carry the heavy kerbstones. The trailer had only two wheels, and so could be used as a see-saw. The judge found, moreover, that "the defendants were fully aware of the risk of injury to children who might play on the trailer, and also knew that it was attractive to children." One Saturday the trailer was left unattended and unsecured some six feet from the roadside at a part of the road which had been completed, though the sewers had not yet been installed. The entire area of roadmaking was one where it was known that children played. The plaintiff in

² Also reported in [1955] 1 W.L.R. 1005.

the course of playing with the trailer was injured, as the judge found, owing to the "negligence" of the defendants.

The defendants, however, denied liability on the ground that the plaintiff was a trespasser, and the only duty owed to trespassers was not to be reckless. The plaintiff, while contending that she was not a trespasser, maintained that the duty not to be reckless was one owed by an occupier, and that non-occupiers such as the defendants owed a duty not to be "negligent." Ashworth J. accepted the view that occupiers of land owe to trespassers merely a duty not to be reckless. He drew no distinction between "activity duties" and passive negligence, but devoted the major part of his judgment to the question whether the defendant was in occupation of the land where the trailer was left. He found that they were not occupiers, and consequently were liable for negligence as opposed to recklessness.

He rightly held that occupation was a question of fact. "The answer in each case depends on the particular facts of the case" (p. 127 D). *Ex facto non oritur jus*: though the facts of *Davis's* case showed many similarities, the case was not of authority on the issue of occupation. It was, however, treated as authority on the legal question of the liability of non-occupiers. Ashworth J. found that "the defendants can only be described as occupiers of such land as was comprised in the length actually under construction." The portion of road to which the trailer had been left adjacent had been completed, and the defendants were no longer in occupation at the time, though they would resume occupation when they returned to lay the sewers and footpath.

Thus the liability of the defendants depended on the precise geographical location of the trailer. Had it been left a few hundred yards away near a road still under construction the defendants would not have been liable. However, by leaving it near a completed road they became liable. The risk to the plaintiff was identical in both places: one place was just as frequented as another. The defendants' knowledge was unaffected by the location of the trailer, nor, apparently, was their work facilitated or inconvenienced by leaving the trailer near a completed or uncompleted road. Ashworth J. said "It may appear surprising, at least to the parties, that the measure of the defendants' obligations to the plaintiff should depend on the answer to the question whether they were in occupation of the land" (p. 126 B). Surely the epithet "surprising" becomes quite inadequate to apply to the situation which makes liability depend on the question of completion of construction of the road adjacent to the trailer. That question depended on the details of the contract between the Birkenhead Corporation and the defendants: it was a matter of concern to them and should have been *res inter alios acta* for the plaintiff.

Of course the invocation of the difficulty of drawing a line is often the basis of a fallacious argument. Two very different principles may in application appear to apply to a common set of facts, and the difference is not abrogated because it is often a matter of difficulty to draw the line where one principle applies and the other does not. But in the present situation the line is not a logical one separating the application of different principles, but a geographical one distinguishing areas to both of which the same legal considerations apply. The reasoning adopted by Ashworth J. is reasonable if some principle can be shown for exempting occupiers of land from taking care when leaving trailers that they should not be a source of danger to children known to play on the land.

If the act of leaving the trailer were classified as a "current operation," then liability could have been fastened on the defendants without embarking on the elaborate examination of the question whether or no the defendants were occupiers. By asking about the defendants' activity instead of the "static condition of the premises" distinctions between the liability of occupiers and non-occupiers are avoided. Both are liable for negligence. The concept of negligence may, however, itself be too blanketing, concealing relevant distinctions. It may mask the socio-legal realities involved. This may be seen if the following situations are considered.

The owner of a trailer leaves it in a garage in town. He knows that the garage is left unattended at times and that children sometimes trespass. A child is injured. Is the trailer owner liable? Or is the garage owner? Does it make any difference if the trailer is left by one who is only a possessor or custodian of it? Does it make any difference if the garage enterprise is conducted by one who does not have possession of the premises? Is the location of the garage in town material?

A trailer is used in farming. One farmer helps a neighbouring farmer by driving a tractor with the trailer in tow. In the evening he leaves the tractor in his neighbour's field, with permission. It is known that children often trespass in the field. A child is injured. Is any farmer liable? Would it make any difference if the trailer had been left in the owner's field, where it was also known that children trespassed?

In *Creed's* case the operations took place in a suburban area. Was the general location significant? If the defendants had not been contractors but servants of the Birkenhead Corporation, who were presumably both owners and occupiers of the premises, would the Birkenhead Corporation have been liable? And their servants also?

Even the "new" approach would discuss these different problems in terms of negligence only. It would be held, however,

that questions of ownership, possession, custody, occupation, contractor and contractee or master and servant were all irrelevant. On the other hand, considerations could be urged to show that considerations of location—town, country, suburbs—might be relevant. The wise solution of the problems does, however, call for a conscious appreciation of the social realities and a balancing of the social interests involved. Such a balancing is necessarily a rough and ready affair, and since a refined analysis is not possible in the present state of our social knowledge and with the present resources of court procedures, it may not be necessary to create any further concepts than that of negligence, provided the concept leads towards, and not away from, a realisation of the interests concerned. The safety of children is not merely a question of the individual interests of particular child plaintiffs, it is a general interest of the community, a “social interest” in Pound’s phraseology. But other interests also exist. The interests of business may have to prevail in urban areas, where the community, moreover, may be expected to provide playing fields for children. In the country the interests of agriculture may require that the parents of children protect them by teaching and other means from the dangers of ordinary farm implements. In town or country or suburb the safety of children may prevail over the convenience of those engaged in road-making.

It may be desirable to protect in some circumstances the interest that a person has in doing just what he pleases without being harassed by the thought of the consequences to others of his acts. It may be good social engineering to say that within his own domestic demesne a man is free to leave a two-wheeled trailer alone and unsecured, despite the known proclivity of the Jones’ children. But the interests of commercial enterprises are to be weighed differently from those of domesticity. I am not dismayed by decisions which encumber commercial enterprises with the cost of insuring against risks of injury to others which could be reasonably foreseen.

There were other interesting points discussed by Ashworth J. in *Creed’s* case. It is sufficient, however, here to add merely that he found that the plaintiff was a licensee of the Corporation. It does not, however, follow that the discussion of liability to infant trespassers was *obiter*. But what is the authority of the *ratio decidendi* of a judgment of a trial judge?

J. L. MONTROSE.

THE FENCING OF GENERAL MACHINERY

THE case in the House of Lords of *John Summers & Sons Ltd. v. Frost* [1955] 2 W.L.R. 825 is one of the most important of the post-war decisions on the Factories Act, 1937. It was concerned

with the meaning of the provision in section 14 (1) that: "Every dangerous part of any machinery . . . shall be securely fenced."

The respondent was a fitter with twenty-five years' experience. "He had to prepare what is called a 'key' from a bar of metal which was about four inches long with a cross-section about three-quarters of an inch square. One end of this bar had to be 'radiused,' i.e., reduced to the shape of a semi-cylinder, and in the course of doing this he used a power-driven grindstone" (at 838-839). Between the tool-rest below and the hood type of guard fencing the top and back of the wheel was exposed an arc of grindstone about seven inches long. In the course of grinding the piece of metal, the workman's thumb slipped against the exposed stone and was severely lacerated. His claim for damages in respect of an injury sustained as a result of his employer's breach of the duty in section 14 (1) was upheld.

The duty in section 14 (1) quoted above raises three main issues of interpretation: namely, (1) the criterion of "dangerous," (2) the range of persons to whom the duty is owed, and (3) the extent to which fencing is necessary to be "secure." The effect of the judgments under review on the law relating to these issues may be summarised as follows.

(1) A part of machinery is "dangerous" if it is a reasonably foreseeable source of injury to any person employed or working on the premises who acts in a way in which a human being may be reasonably expected to act, by which it is intended to include the behaviour of not only the prudent, alert and skilled workman intent upon his work but also the worker who is careless, inattentive or indolent in performing his tasks (at 828-829, 841, 843).¹ The highest judicial approval has thus been conferred on the statements of law to be found in particular in *Hindle v. Birtwhistle* [1897] 1 Q.B. 192, 195; *Walker v. Bletchley Flettons Ltd.* [1937] 1 All E.R. 170, 175; *Stimpson v. Standard Telephones & Cables Ltd.* [1940] 1 K.B. 342, 359-360; *Mitchell v. N. British Rubber Co.* 1945 S.C. (J.) 69, 73; *Smithwick v. N. C. B.* [1950] 2 K.B. 335, 346-347, 351, and *Burns v. Terry* [1951] 1 K.B. 454, 461, 467.²

Three principal types of case have come before the courts on this issue. They may be called by the convenient abbreviations of the "contact," the "danger out of reach," and the "flying

¹ It may be noted that the reasonable foresight criterion of whether the duty to fence arises implies in principle that the common law duty to take reasonable care for the safety of the workman is also evoked, as it were, in parallel. The statutory and common law duties differ, however, in the extent of fencing they require: the common law stops short of fencing which would make a machine unusable or commercially impracticable.

² It follows, therefore, that a part of machinery "is in such a position or of such construction as to be safe to every person employed or working on the premises as it would be if securely fenced" (s. 14 (1)), only if it is in such position or of such construction as not to constitute a reasonably foreseeable source of danger to such persons: cf. Denning L.J. in *Burns v. Terry*, *supra*, at p. 467.

part" cases. As to "contact" cases,³ the relevant issue has been whether it was reasonably foreseeable that the person in question might to his detriment come into contact with the particular part of the machinery. Similarly, in the "danger out of reach"⁴ cases, the issue has been whether it was reasonably foreseeable that the person in question might none the less reach up or under or through or across to the particular part of the machinery.

In the "flying part" cases too, it is respectfully submitted, the legal test today is the general one laid down in *Summers'* case, namely, whether it was reasonably foreseeable that the particular part of the machinery might fly or break off, injuring the person in question. After *Nicholls v. Austin* [1946] A.C. 493, it appeared that the narrower rule of law might become established that the occupier of a factory was in no wise to be liable if a person working on the premises sustained injury from a part of machinery which flew off and struck him, it being stated *obiter* that the purpose of fencing under section 14 was "to keep the worker out, not to keep the machine . . . in" (at 505, *per* Lord Simonds, as he then was). On the validity of this dictum strong doubt was cast in *Carroll v. Barclay* [1948] A.C. 477, 485, 486-487, 490 and 492; and the general form in which the criterion of "dangerous" has been affirmed in *Summer's* case coupled with the approval there given to *Hindle v. Birtwhistle* (*supra*) lend, in my respectful submission, powerful support to the view that the dictum of Viscount Simonds contained an erroneous interpretation of the circumstances in which the general duty to fence under section 14 (1) arises.

Of course, the criterion of reasonably foreseeable danger does not apply to materials or articles which are not part of a machine but "which are dangerous while in motion in the machine" (s. 14 (3)), as in the case of the objects in *Nicholls v. Austin* itself. The general duty to fence is confined by section 14 to the actual parts of machinery. But if, as in *Hindle v. Birtwhistle*, it was reasonably foreseeable that a particular part of a machine might fly off and injure the operator or other person, then that part is dangerous and must be securely fenced. It is because it is not usually possible let alone reasonable for a factory occupier to foresee that some part of a machine might *break* and fly off causing injury, that liability for failure to fence does not normally result from injury inflicted by the flying fragments of a broken machine. Nevertheless, if the circumstances are such that even this risk is reasonably

³ Like *Smithwick v. N. C. B.*, *supra*; *Benn v. Kamm* [1952] 2 Q.B. 127. According to the classification adopted above, *Kinder v. Camberwell B. C.* [1944] 2 All E.R. 315 is a "contact" rather than a "flying part" case. As Lord Normand pointed out in *Carroll's* case, *supra*, at p. 491, the handle of the machine in *Kinder* swung up, it did not fly off. But, as stated above, the distinction between the "contact" and "flying part" cases is now merely a factual not a legal one.

⁴ Like *Findlay v. Newman, Hender & Co.* [1937] 4 All E.R. 58; *Burns v. Terry*, *supra*; *Smith v. Chesterfield & District Co-operative Society, Ltd.* [1953] 1 W.L.R. 370.

foreseeable, as in *Dickson v. Flack* [1953] 2 Q.B. 464, then the duty to fence and liability in default follow.

(2) It follows, and is to a considerable degree a repetition of the criterion of "dangerous" that the general duty in section 14 may be said to be owed to not only the actual operator but also any other person employed on the premises whom it was reasonably foreseeable might be injured by the part of machinery in question in its unfenced state (see *Summers, supra*, at 841).⁵ "Persons employed" go beyond the servants of the factory occupier and include the servants of a sub-contractor: e.g., *Butler v. Glacier Metal Co.* (1924 Div. Ct. cited in *Atkinson v. L.N.E.R.* [1926] 1 K.B. 313, 317, but otherwise unreported).

(3) Once it is decided that a part of any machinery is dangerous then it must be "securely fenced," by which is meant that it must be so fenced as to give effective protection to the person in question from the reasonably foreseeable danger (*Summers, supra*, at 828); the fencing must "remove the danger which would exist in its absence" (*ibid.* at 840).

It was remarkably appropriate that the piece of machinery involved in *Summers'* case was a grindstone, for of all pieces of common machinery the grindstone is notoriously intractable to the provision of a guard which makes the stone at once safe and operable. To remove from a workman all danger of injuring his hands on a grindstone it is in practice necessary to run a guard around the entire stone, rendering it unusable (*cf. Summers, supra*, at 844). With regard to this possibility, the House of Lords affirmed the absolute character of the duty in section 14 and set the seal of its authority on the statements of law in *Davies v. Owen* [1919] 2 K.B. 39, 41, and *Miller v. Boothman* [1944] K.B. 337, 341, that failure securely to fence a dangerous piece of machinery is not excused merely because such fencing would render the machine unusable or commercially impracticable—subject, it must immediately be added, to the power of the Minister of Labour to modify the absolute obligation by issuing such special regulations as he may see fit under section 60 of the 1937 Act.⁶ In respect of such problems of fencing arising out of section 14 (1), it is not for the courts, but for the Minister in his capacity as an organ of delegated legislation to reconcile the requirements of human safety with those of commercial need.

C. GRUNFELD.

HAIRDRESSERS AND THE USE OF HAIR DYES

Ingham v. Emes [1955] 3 W.L.R. 245; [1955] 2 All E.R. 740, is a case of considerable importance to hairdressers and to customers

⁵ *Cf. Harrison v. Metropolitan Plywood Co.* [1946] K.B. 255.

⁶ Note the disagreement between Lords Reid and Keith as to the scope of the Minister's power under s. 60: *Summers'* case, *supra*, at pp. 846, 849-850.

who have their hair dyed with "Inecto" or some similar preparation.

The reported decisions concerning hairdressers in modern times date from the 1930s, and the manufacturers responsible for putting on the market the hair dye products in question were usually joined as co-defendants on the ground that they were guilty of negligence in failing to warn the customer of the inherent dangers of such substances: *Parker v. Oloxo Ltd. and Senior* [1937] 3 All E.R. 524; *Watson v. Buckley, Osborne Garrett & Co. Ltd. and Wyrovoy's Products Ltd.* [1940] 1 All E.R. 174. But in view of *Holmes v. Ashford and Others* [1950] 2 All E.R. 76 success in actions against manufacturers would now appear to be less likely. In that case the manufacturers of "Inecto" had given a warning to the hairdresser by means of a label on the bottle and also by a brochure of instructions stating the potential danger if tests were not first carried out on the hair of customers to see whether such a dye were suitable, before applying the full treatment. The Court of Appeal held that the terms of this warning were sufficient to exclude their liability for negligence if a customer suffered damage thereby. But it must be pointed out that in giving judgment Tucker L.J. said (at p. 77): "Cases may possibly arise where criticism may be made that the warning is not in sufficiently large print, or complaints may be made where the substance is used by a woman on her own hair¹ and by holding that the warning was sufficient in the present case, I must not be taken to imply that a similar warning would be sufficient in those circumstances."

The customer, however, is not without a remedy, for he may still have a right of action against the hairdresser for breach of contract and possibly for negligence, depending on the circumstances.

In *Parker v. Oloxo Ltd. and Senior* (*supra*) the hairdresser had expressly warranted that a dye named "Oloxo" was safe for the customer to use, but in fact it was not. Hilbery J. held that she was entitled to recover damages for breach of contract. In *Watson v. Buckley, Osborne Garrett & Co. Ltd. and Wyrovoy's Products Ltd.* (*supra*) the hairdresser was held liable in contract, for by using the dye she had impliedly warranted that it was safe. It was argued on behalf of the hairdresser that, on the facts of the case, this implied warranty had been negatived by the fact that she told the customer that she had not tried out the dye before and that it was new to her. Stable J., however, rejected this contention. His Lordship said (at p. 180): "In my view there is an implied warranty, or it is an implied term of the contract, that when I go into a hairdresser's shop and say I want my hair done, the hairdresser will apply to my head something

¹ See on this point the Canadian case of *O'Fallon v. Inecto Rapid (Canada), Ltd. et al.* [1939] 1 D.L.R. 805.

which is a hair dye, and not something which in this particular case, through no conceivable fault or negligence on the part of (the hairdresser), was in fact a poisonous and harmful substance." Again in *Holmes v. Ashford and Others* in the court below² Croom-Johnson J. gave judgment for the customer who claimed damages for breach of contract on the ground that the dye used was not fit for the purpose, because when it was applied it caused injury to her hair.

But *Ingham v. Emes* (*supra*) has now indicated that this implied term is limited in its operation. In this case the hairdresser carried out in the proper manner the test required by the manufacturers of "Inecto" and the customer's skin showed no reaction to it. A week later she had her hair dyed, and within a few days she was found to be suffering from acute dermatitis, which was undoubtedly due to the "Inecto." She thereupon claimed damages for breach of contract and for negligence. The county court judge dismissed the claim for negligence, but allowed the claim for breach of contract on the ground of breach of an implied warranty.

It was proved that the customer knew that she was allergic to this particular form of hair dye, but had not disclosed this fact to the hairdresser. The defendant appealed to the Court of Appeal on the claim for breach of contract and the court reversed the decision of the county court. In giving judgment Denning L.J. said that the implied term in such contracts was analogous to the corresponding term in the sale of goods. In order for the implied warranty to arise the customer had to make known to the contractor expressly or by implication the "particular purpose" for which the materials were required so as to show that he relied on the contractor's skill or judgment. The "particular purpose" in this case was to dye the hair not of a normal person but of a person known to be allergic to "Inecto" and this particular purpose had not been made known. Birkett and Romer L.JJ. delivered judgment to the same effect. Romer L.J. considered that it would be against all justice that the customer should recover damages against the hairdresser for breach of warranty which would never have been given if the plaintiff's knowledge of the allergy had been disclosed.

Hairdressers can insure against liability to their customers for breach of contract and for negligence, but would naturally prefer not to have actions fought out in the glare of publicity. The decision in *Ingham v. Emes* (*supra*) may perhaps encourage them to ask their customers to disclose, preferably in writing, whether to their knowledge they are allergic to the preparation about to be administered. It is to be noticed, however, that Romer L.J. stated that he would express no opinion as to what the position would have been if the plaintiff had had no reason to suppose that "Inecto" was harmful to her. On the other hand Denning L.J.

² [1950] *The Times*, February 17.

thought that the implied term operated in favour of all persons who passed the test, except those who were allergic and did not disclose the fact. A similar view was expressed by Birkett L.J.

E. R. H. IVAMY.

OFFER AND ACCEPTANCE BY TELEPRINTER

THE decision of the Court of Appeal in *Entores, Ltd. v. Miles Far East Corporation* [1955] 3 W.L.R. 48; [1955] 2 All E.R. 593 will undoubtedly take up a position among the "Greats" in the law of the acceptance of an offer. The facts were as follows. Entores, Ltd., the plaintiffs, carried on business in London, and Miles Far East Corporation, the defendants, were an American Corporation who had agents in Amsterdam. Both the plaintiffs and the defendants' agents had in their respective offices a teleprinter by which messages could be typed in one country and almost instantaneously received and typed in another. In September, 1954, the plaintiffs made an offer to the defendants' agents in Amsterdam, using the teleprinter, and an acceptance of that offer was communicated by the same means to the plaintiffs. The plaintiffs later alleged that the defendants had been guilty of a breach of contract and they accordingly applied under Order 11, r. 1 (e) of the Rules of the Supreme Court for leave to serve notice of a writ on the defendants out of jurisdiction on the ground that the contract had been made in England.

The Court of Appeal, consisting of Denning, Birkett and Parker L.JJ., held that the contract had been made in England.

The ordinary rule of law, it was pointed out, was that the acceptance of an offer must be communicated to the offeror and that accordingly, the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree. True it is that in the case of the formation of a contract through the post, the contract is complete as soon as the letter of acceptance has been posted, but this is merely an exception to the general rule based upon the principle that the offeror must be deemed to have waived the requirement of actual notification (see *Household Fire Insurance Co. v. Grant* (1879) 4 Ex.D. 216). Other examples of cases falling within the same principle are the reward cases (see *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256). The only question which therefore arose was whether communication by teleprinter, which was virtually instantaneous communication, was to be admitted as an illustration of, or an exception to, the general rule requiring communication. Birkett and Parker L.JJ. were both content to base their judgment on the ground that they could see no reason for departing from the general rule. Denning L.J., however, considered that in a matter of this kind, it was important that there should be uniformity

in the countries of the world and his Lordship found that although the rule was otherwise in America, most European countries adopt the rule that in the case of instantaneous communications, notification of the acceptance must actually be received by the offeror. Thus, if a man telephones his acceptance but as he is doing so the line goes "dead," there is no contract. What is to happen, however, if the man sending the message of acceptance does not know that his message did not get home? For example, if the listener on the telephone does not catch the words of acceptance but nevertheless does not trouble to ask for them to be repeated? In such a case Denning L.J. is prepared to make a concession to the rule. Quoting from his judgment: "The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract."

E. H. SCAMELL.

PRIVATE CONTRACT AND FAMILY LAW

IN *National Assistance Board v. Parkes*,¹ the Court of Appeal,² (upholding a decision of the Divisional Court), has strengthened a line of development by which the judges, as well as the legislature,³ have increasingly tended to the view that the doctrine of freedom of contract is inappropriate in the field of family law. In particular, there is increasing authority to the effect that husbands and wives cannot impose contracts on each other which shall thereafter remain unimpeachable in the courts.

The decision of the House of Lords in *Hyman v. Hyman*⁴ probably represents the watershed from which these later developments flow. It may be no accident that the line of decision shows most clearly when the rights of public authorities come into conflict with contracts between the parties to a marriage, for in such cases the alternatives of public good and private right are most clear-cut. The judges are clearly not inclined to hold that a man

¹ [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.

² Of Denning, Birkett and Romer L.JJ.

³ The Matrimonial Causes Act, 1950, s. 25, re-enacts without change the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, but the extent of its operation has since been defined in *Bennett v. Bennett* [1952] 1 K.B. 249, in which the Court of Appeal affirmed Devlin J.'s decision that agreements by a wife not to make applications to a court for maintenance on divorce are void. Denning L.J. added that such agreements should be brought before the court for sanction when the marriage is dissolved. The effect of this decision is to make such agreements subject to an order of the court, and by s. 28 all such orders of the court, even if for secured payments, are for the first time made subject to variation by the court at any time on change of circumstances.

⁴ [1929] A.C. 601.

can shelve on to the public the duty of maintaining his wife when she has committed no matrimonial offence. It might also be that the courts are increasingly realising that bargains between husband and wife may bear most hardly upon their children, who have neither independent rights to maintenance available against their parents, nor the capacity to bargain with them. In such circumstances an independent public authority may well be better placed to exact the proper performance of parental duties than any one parent.⁵

The facts of *National Assistance Board v. Parkes* indeed disclose a somewhat disquieting situation. Two and a half years after their marriage the parties entered into a separation agreement, by which they agreed to live separate and apart, and the wife undertook not to claim any maintenance or any financial provision from her husband in respect of herself or their child, and not to petition any court at any time, nor to take any steps to compel the resumption of cohabitation. Less than two years later, the wife and child were in such need that they had to resort to public assistance. On the advice of officers of the Board, the wife made a complaint to the justices under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, that her husband had wilfully neglected to maintain her, but this complaint was withdrawn when the husband (who was receiving a gross salary of £900 per year) consented to an order under the Guardianship of Infants Acts, 1886 and 1925, by which he was to pay the maximum amount of 30s. per week for the maintenance of the child, plus a voluntary 10s. per week for the same purpose. The wife's covenant not to claim maintenance from her husband was thought to bar any claims for her own maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, but the National Assistance Board proceeded against him under the National Assistance Act, 1948, s. 43, for contributions towards the cost of maintaining his wife at the public expense. The wife was unwilling to resume cohabitation with her husband, but there was no allegation that she had committed any matrimonial offence.

The justices at first instance held that the right of the Board (representing the public) to recover contributions from the husband towards the cost of maintaining his wife was likewise barred by the wife's undertaking not to claim or sue for maintenance by her husband, but the Divisional Court held⁶ that this was not so, since the right of the National Assistance Board under the National Assistance Act, 1948, s. 43, was independent of the wife's right to sue for maintenance. The Court of Appeal has now confirmed this decision.

⁵ Such a public authority will almost invariably have greater facilities for tracing a husband's whereabouts, and the resources to apply constant legal pressure upon him.

⁶ [1955] 2 W.L.R. 622.

Both Denning and Birkett L.JJ. were emphatic that the dicta of the Court of Appeal in *Chapman v. Chapman*⁷ must give way before their later decision in *Tulip v. Tulip*,⁸ that the court will take jurisdiction to make orders for maintenance under the Matrimonial Causes Act, 1950, s. 23, even when an existing agreement for maintenance has been faithfully observed. They both agreed also that a husband remains equally liable to claims for the maintenance of his wife when he has not undertaken to pay her any maintenance at all as when he has agreed to pay her maintenance when it then or later becomes inadequate. Denning L.J. further suggested that the decision of the Probate Division in *Stringer v. Stringer*⁹ means only that a husband is not guilty of wilful neglect to maintain his wife, for the purposes of complaint before the magistrates, so long as he is unaware of her need or the change in her circumstances that has given rise to it.

One result of these developments would appear to be a probable decline in the popularity of the separation agreement between husband and wife, now that element of immutability in the terms agreed between them has gone. Such agreements probably served to reduce the number of petitions for divorce and other remedies before the courts. They did not, however, reduce the number of broken marriages, but merely screened them from the public gaze, and it can hardly be contended that they tended to raise moral standards, since the possibility of one or both of the parties making unofficial cohabitation arrangements with other persons can hardly have been remote.

O. M. STONE.

WHEN IS CHARITABLE NOT CHARITABLE?

Re Cox (H. C.) deceased, Baker v. National Trust and Others, etc. [1955] 2 All E.R. 550 is, as far as I am aware, the first case in which it has been held that the word "charitable" when used by itself was capable of including within its compass objects which were not charitable. One's first reaction is, therefore, one of suspicion, but a careful perusal of the case leaves no doubt about its correctness. The decision merely reinforces the emphasis which has become increasingly apparent in this sphere since the war,

⁷ Unreported, April 4, 1951, heavily relied on by Lord Merriman P. in his judgment in *Stringer v. Stringer*, *post*.

⁸ [1951] P. 378.

⁹ [1952] P. 171. The headnote gives the decision in this case as follows: "Where husband and wife separate by agreement and the wife subsequently issues a summons against the husband for wilful neglect to maintain her, the onus of proving that the husband has agreed to maintain her lies on the wife." Lord Merriman P. (though not Karminski J.) certainly referred to the lack of notice to the husband in this case of the change in the wife's circumstances, but devoted the greater part of his judgment to an exposition of the dicta in *Chapman v. Chapman* supporting the view that a husband has no burden of disproving an obligation to maintain his wife.

viz., that a trust in order to be charitable in the legal sense must have two elements, (1) an object within the words or spirit of the Act of Elizabeth of 1601; and (2) "benefit of the community or an appreciably large section of the community": *Verge v. Somerville* [1924] A.C. 496, 499. If the testator uses the word "charitable" and neither adds to it nor qualifies it in any way he creates a good charitable gift: if he adds other words to the word "charitable" these may have the effect either (1) of enlarging the objects beyond the legal scope of charity or (2) of restricting the operation of the gift to a class which is not sufficiently public: in either case the gift will fail. *Re Cox* is an example of the second type of additional or qualifying words. In the case there was a bequest of residue on trust "to pay the income in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of the Canada Life Assurance Company and/or the dependants of such employees. . . ." This is as clear an example as one could wish to find of repugnancy. The draftsman begins by creating a trust for charitable purposes only, and then immediately contradicts himself by restricting its operation to a class which in general cannot be the object of charity. The repugnancy was, however, not complete since a trust for the relief of poverty is nonetheless charitable because its scope is confined to a restricted class. This is true of poor relations (*Isaac v. Defriez* (1754) 17 Ves. 373) and probably also of poor employees (*Gibson v. South American Stores* [1950] Ch. 177 (C.A.)); though the matter was left open in *Oppenheim v. Tobacco Securities Trust Co.* [1951] A.C. 297 (H.L.)). The only hope, therefore, of saving *Re Cox* was by reading the words of the bequest as if they meant that the trustees should apply the income not for all or any of the purposes which the law recognises as charitable but only for such of those purposes as having regard to the prescribed beneficiaries could be regarded as charitable. This mode of construing the bequest was rejected: the only possible charitable purpose which would come within it would be the relief of poverty and the testator could not, having regard to the surrounding circumstances, have had this in mind. The employees and ex-employees of the company were not likely to be mainly poor, so that a small bequest would have been sufficient for this purpose if it was what the testator had in mind. In fact, however, the sum left was relatively large, which pointed clearly to the conclusion that he contemplated other objects than the relief of poverty.

O. R. MARSHALL.

AMALGAMATION OF TRUST FUNDS

A COLLEGE or learned society is likely to have, apart from its corporate property, many separate trust funds for the provision of

prizes, the endowment of research, and so on. These funds may be of widely differing values, but will be of the same general nature, namely that the income is to be devoted to the object in perpetuity. In these circumstances the college or society may wish to amalgamate all the assets into a common capital fund, attributing to each trust a share proportionate to the value of its assets at the date of the amalgamation. The effect will be to establish a kind of domestic unit trust, with obvious advantages for the management of investments and the apportionment of administrative costs. If the number of funds is large enough, these advantages will outweigh the expense of the original operation and also that of revaluing the entire capital fund whenever a new trust is brought in or new money given for a trust already included.

For the universities of Oxford and Cambridge and their several colleges, and for Winchester College, the Universities and Colleges (Trusts) Act, 1948, provides an easy way of effecting such an amalgamation; they may make a scheme and have it approved, like one of their statutes, by Order in Council. Other bodies similarly placed must seek the help of the court. *Re Royal Society's Charitable Trusts* [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14, establishes that the court has jurisdiction to make such an order, but indicates that it will not necessarily be willing to do so.

The case also throws rather uncertain light on a matter of wider interest, namely the power of the court to permit investment outside the authorised range.

The Royal Society, as trustee of thirty-three trusts, sought (a) permission to amalgamate their funds, and (b) an enlargement for the amalgamated fund of the range of permissible investments. The summons came before Vaisey J. in chambers, and was adjourned into court for argument on the question of jurisdiction. The judge held that he had jurisdiction to make the order, arising out of the special position of charitable trusts. On that footing he made an order by way of a scheme permitting the desired amalgamation, and also permitting investment for the amalgamated fund within a very liberal range, provided that at least one third of the assets should always be in normal trustee securities. He emphasised, however, that he did this only because of exceptional circumstances, including the care which the Royal Society had been shown to take in choosing its investments. "Again, it by no means follows that the range of investment ought to be widened as of course whenever a charity finds its available income less than the trustees of it would wish. The existence of a multiplicity of trusts under the administration of one trustee ought not in every case to be regarded as justifying a pooling of investments. The jurisdiction which I hold that I have, should, in my judgment, be exercised sparingly, and not indiscriminately."

The case was originally put forward as one which fell under section 57 of the Trustee Act, 1925, or alternatively as coming

under the court's general jurisdiction over all trusts; and the judge's decision that his power flowed from neither of these sources, but from the special law about charities, may be something of a surprise. Section 57, in particular, certainly applies to charitable trusts, and there seems no obvious reason why it should not have covered these proposals. The section was in fact used to amalgamate two charitable trust funds in *Re Harvey* [1941] 3 All E.R. 284, though admittedly those funds were held on exactly similar trusts. It was also regarded by the Committee on Charitable Trusts, in paragraph 279 of their Report, as the only means by which any trustees, charitable or other, could enlarge their range of investment.

S. F. C. MILSOM.

THE HOUSE OF LORDS AND SCOTTISH APPEALS

IN Professor D. M. Walker's interesting address on Scots law (18 M.L.R. 321) he refers to the various disadvantages of the House of Lords as a final court of appeal for Scotland. One of these is the fact that as the House usually sits five, the customary two Scots Lords of Appeal are necessarily in a minority even if both are sitting. Speaking of a test scrutiny of appeals reported in [1951] A.C., he says that in no case were more than two Scots present among the five and "the Scottish Lords could then never by themselves affect any doctrine of English law. But in Scottish appeals the English Lords could have their way every time if so minded" (p. 344). This, perhaps, is a rather depressed view. There are many instances in the books where the English judges below, and two of the five law lords, have all been of one view, but as one English law lord and two Scots have been of the other, the Scottish view has prevailed. Again, there were the golden days when three Scottish Lords of Appeal were sitting—Viscount Dunedin, Lord Thankerton and Lord Macmillan. Examples of English appeals being decided by a predominantly Scots House of Lords will be found at [1930] A.C. 415, 527, 549; [1931] A.C. 726; [1932] A.C. 392, 624, 663; [1933] A.C. 1, 28; and examples of such a House deciding Scottish appeals are at [1930] A.C. 503, 588 and [1931] A.C. 351. In one case, there were three Scots and a solitary Englishman, who nevertheless, it must be admitted, delivered the longest speech: [1930] A.C. 588. And in a group of eight English rating appeals heard by four law lords, the opinions of one of the two Scots present, Viscount Dunedin, were read as being the opinions of the House: [1931] A.C. 446. Such a state of affairs appears to have produced no outcry that England was an oppressed majority, despite the relative sizes of the Scottish and English Benches and Bars. Perhaps, too, a sympathetic Scottish tear might be shed for Ireland, which never attained a predominance *in dom. proc.* to equal Scotland's. One possibility

would be to take as a model one of the old Courts of Exchequer Chamber, in which the judges were the judges of the two common law courts other than that appealed from. Thus English appeals would be heard by the Scottish and Irish lords, and Scottish appeals by the English and Irish: or is Scotland better off as she is?

R. E. M.

INTENT TO CREATE LEGAL RELATIONS, MUTUALITY AND CONSIDERATION

WILLISTON, when criticising the view that a contract requires an intention to create legal relations, pointed out that this intent is frequently fictitious. This is borne out by *Simpkins v. Pays* [1955] 1 W.L.R. 975; [1955] 3 All E.R. 10, where an agreement made informally by a landlady, eighty-three years of age, and her lodger to take part jointly in a newspaper competition and to go shares in any prize that they might win, was held to constitute a binding contract. The argument that the parties in this case, as in *Balfour v. Balfour* [1919] 2 K.B. 571, or in *Hoddinott v. Hoddinott* [1949] 2 K.B. 406, did not contemplate legal relations was dealt with by Sellers J., not by attributing to them a fictitious intent, but by insisting "that in the present case there was a mutuality in the arrangement between the parties."

In order to reconcile this decision with *Balfour v. Balfour* and with *Hoddinott v. Hoddinott*, which is even more in point, one cannot rely upon the fact that the earlier cases arose between husband and wife, because the rule established there is also thought to apply to social engagements between friends or to domestic arrangements made inside the family, and the parties in *Simpkins v. Pays* were members of a household which was found to have had "some element of a family circle about it." Is it possible then to distinguish the earlier cases on the ground that they turned upon the presence of an intention *not* to create legal relations? This distinction seems to be suggested in a note on *Simpkins v. Pays* in the *Law Quarterly Review*, Vol. 71, p. 457. It would explain such decisions as *Rose & Frank v. Crompton* [1925] A.C. 445, where the parties had expressed an intention not to create legal relations, but, with respect, this distinction appears inadequate where, as in *Balfour v. Balfour*, no such intention was ever expressed. If, as the learned writer of the note on *Simpkins v. Pays* explains, "in the present case it is highly improbable that the parties had any intention, one way or the other," is it not equally improbable that the *Balfours* or the *Hoddinotts* had any intention, one way or the other? *Simpkins v. Pays*, it is submitted, demonstrates the objections to fictitious intentions, regardless of whether they are formulated in positive or negative terms.

But even if these attempts to distinguish *Balfour v. Balfour* are not accepted, it by no means follows that, on the authority of

Simpkins v. Pays, social or domestic arrangements must be treated as binding contracts. *Balfour v. Balfour* has been described by Professor Kahn-Freund, in (1952) 15 M.L.R. at p. 138, as "one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate." Without wishing to question the soundness of this comment, which is certainly in accordance with general opinion, one may yet ask whether it was necessary to resort to a fiction in order to reach a realistic decision. The use made by Sellers J. of the concept of mutuality suggests that this paradox might have been avoided. What he meant by mutuality can best be understood from his observations on the position of the landlady's granddaughter who was the third member of the syndicate formed in *Simpkins v. Pays*. She was not a party to the action, and although prima facie entitled to a third share of the prize money, it was also possible, as Sellers J. explained, that she intended to give gratuitously the benefit of her assistance to her grandmother. In that case the grandmother's promise to share the prize with her granddaughter would not have been binding. There would have been an exchange of gratuitous promises between grandmother and granddaughter: a promise to help an aged grandmother, given in consideration of love and affection, and a promise to share a prize with a beloved grandchild, again given out of love and affection and not in consideration of the granddaughter's contribution to the syndicate. Whereas landlady and lodger had struck a bargain by the exchange of mutual promises, the position as between grandmother and grandchild would be determined by the absence of mutuality.

Against this use of mutuality it might be objected that although it explains the difference between the position of the lodger and that of the granddaughter, it does so only by substituting mutuality for an intent to create legal relations. Moreover, as mutuality presupposes an intention to bargain as distinct from an intention to give, or to promise, gratuitously, it appears to make the existence of a contract depend upon the subjective element of intent which cannot be reconciled with the prevailing theory which demands objective tests to determine the existence of contracts.

The answer to these objections is that mutuality depends, not upon intention, but upon the terms of the promises which have been given. Did the grandmother promise to share the prize on condition that the granddaughter gave assistance, or was no such condition attached to the promise? Did the granddaughter promise her services free, or only upon condition of being offered a share in the syndicate? To answer these questions it would be necessary to ascertain the intention of the parties. But once these questions were answered the terms of the agreement would be established as objective facts which would determine the presence of mutuality. The intention of the parties, therefore, would be used to find out the terms of the agreement, but not to decide

whether these terms constituted a contract. Thus, mutuality, as the word was used in *Simpkins v. Pays*, is different from an intent to create legal relations. But, it is submitted, it indicates no more than the presence of consideration.

It is the failure to appreciate this point which explains why the requirement of intent to create legal relations has established itself firmly in spite of the powerful criticisms which Williston and others have raised against it. In *Balfour v. Balfour*, Atkin L.J. (as he then was) insisted that "arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences." Despite the significant caution implicit in the phrase "consideration in form," this statement must be read as asserting that an agreement supported by consideration may yet not amount to a contract, an assertion made possible only because Lord Atkin's definition of consideration, although it stated that it may consist of a benefit received by one party or a loss suffered by the other, failed to add that such benefit or loss must be received or suffered as the price for a promise. Unfortunately, the omission of this vital part of the definition of consideration which ensures the presence of the element of bargaining or mutuality in contracts, was allowed to pass unchallenged. Mr. Raphael Tuck who, in an article in the *Canadian Bar Review*, Vol. 21, p. 123, attacked the requirement of the intent to create legal relations, was content to dispose of Lord Atkin's judgment by showing that the issue of consideration did not arise in *Balfour v. Balfour*, which was a case of a unilateral promise by the husband, unsupported by consideration. To expose the fallacy involved in the requirement of intent to create legal relations it would have been necessary to point out that an agreement between husband and wife may be lacking consideration not only when it consists of no more than a single promise by the husband, but also when, for instance, the husband's promise to pay housekeeping money is made in connection with a promise by the wife to perform household duties. In the normal course of family life, the husband's promise of support is not offered in payment for the services of his wife. Her services are given gratuitously. The family circle differs from the market place in that it is not the setting for bargaining but for an exchange of gifts and of gratuitous services. The absence of consideration, it is submitted, provides a simpler and more realistic explanation of the special quality of domestic arrangements than Lord Atkin's description of the home as a sort of charmed circle, "a domain into which the King's writ does not seek to run."

The effects of Lord Atkin's judgment were twofold. It established the requirement of intent to create legal relations and at

the same time it tended to obscure understanding of the simple nature and function of consideration. This last effect may prove more permanent than the first. In *Simpkins v. Pays*, Sellers J. was unwilling to fall back upon the intent to create legal relations, yet he no doubt deliberately chose to introduce mutuality rather than consideration into his reasoning. To point to the presence of consideration as the answer to the argument that there was no intent to create legal relations would have constituted a direct contradiction of Lord Atkin's celebrated judgment, which had been accepted as authoritative by the Law Revision Committee in its Report on Consideration (at p. 15), by the Court of Appeal in *Hoddinott v. Hoddinott*, and indeed by every English textbook on the subject. The serious dangers of employing the nebulous concept of mutuality instead of the familiar doctrine of consideration are clearly demonstrated by another recent case where the same course was taken.

In *Rajbenback v. Mamon* [1955] 1 Q.B. 283, the landlord of a controlled flat had agreed to pay to the tenant a sum of money in consideration of the tenant's undertaking to vacate the flat. The landlord then repudiated the agreement before the tenant had left and the tenant now claimed a declaration that the agreement was binding.

If this had been a unilateral contract, payment being promised if and when the tenant should leave, there would have been, as the landlord admitted, no answer to the tenant's claim, once he had left. But Wynn-Parry J. found that this was "quite clearly an agreement composed of promise for promise." The validity of this agreement was contested on the ground of want of mutuality. Wynn-Parry J. easily disposed of this argument by showing that there are many contracts which are not destroyed although robbed by Parliament of some degree of mutuality. But in view of the line of decisions from *Hyman v. Hyman* [1929] A.C. 601, to *Combe v. Combe* [1951] 2 K.B. 215, and *Goodinson v. Goodinson* [1954] 2 W.L.R. 1121; [1954] 2 All E.R. 255, the learned judge, it is respectfully submitted, was not entitled to pass in silence over the defence that the tenant's undertaking did not provide consideration for the landlord's promise of payment. This decision also illustrates the ambiguity of mutuality. As used in this case this term has little in common with the sense in which it was employed in *Simpkins v. Pays*, except that in both cases it would have been more satisfactory to analyse the problem in terms of consideration.

Rajbenback v. Mamon also invites comparison with the decision of Vaisey J. in *Comber v. Fleet Electrics, Ltd.* [1955] 1 W.L.R. 566; [1955] 2 All E.R. 161. Here the landlord had agreed to consent to an assignment of the lease in consideration of the tenant giving, in effect, a promise to pay a fine, contrary to section 144 of the Law of Property Act, 1925. In this case it was the tenant

who refused to keep his promise. But as far as mutuality was concerned the situation was not unlike that in *Rajbenback v. Mamon*. Mutuality was, however, not raised and Vaisey J. held that the contract was not binding. The undertaking given by the tenant "was a *nudum pactum*; there was no consideration for it," which implied that the tenant would not have been able to enforce the landlord's undertaking. With this implication *Rajbenback v. Mamon*, where the landlord's promise had been held to be binding, cannot be easily reconciled. Yet the decision of Vaisey J. would seem to be preferable, if only because it recognised the importance of the distinction between giving a promise which cannot be enforced, as that of the tenants in these two cases, and the actual performance of such promises which would provide valid executed consideration since, as Vaisey J. emphasised, the fine, if paid, would not have been recoverable, just as the tenant in *Rajbenback's* case would not have been able to return to the flat once he had vacated it.

Consideration, as these cases show, provides a better test of the validity of an agreement than either mutuality or the intent to create legal relations. As long as it is the policy of the law to retain the doctrine of consideration, despite the several direct attempts which have been made to abolish it, there is no need for these other concepts which are merely inadequate substitutes for consideration and which have been able to establish a foothold in the law only because they have not been recognised as such. They should be exposed and removed in order to protect the law of contract from being overlaid by a multiplicity of unnecessary and possibly contradictory requirements.

J. UNGER.

REVIEWS

LE DIVORCE, LA SÉPARATION DE CORPS ET LEURS EFFETS EN DROIT INTERNATIONAL PRIVÉ FRANÇAIS ET ANGLAIS. (Étude de Droit Comparé.) By PETER BENJAMIN, M.A., LL.B.(Cantab.), Docteur en Droit. [Paris: Librairie Générale de Droit et de Jurisprudence. 1955. xii and 253 pp.]

ONE must first congratulate Dr. Benjamin upon the successful presentation of a *thèse du doctorat* in the University of Paris, now published with the co-operation of the Centre National de la Recherche Scientifique. His subject is one of perennially topical interest with an abundance of material, both forensic and textual, on both sides of the Channel: and exhaustively is it covered, though naturally it is divorce which principally engages the author's attention. Dr. Benjamin discusses historically the rules of French courts and those of England for the assumption of jurisdiction to entertain petitions for divorce or separation, including the question of *lis alibi pendens* and, for England, the magistrates' jurisdiction which has no French counterpart; the choice of law in each country when the municipal courts have jurisdiction; the effects of a decree or order in France and England, respectively, both on the parties themselves (their ability to remarry, the right of the former or separated wife to retain her husband's name, etc.) and in such matters as awards of damages, custody of and access to issue of the marriage, property relations and ancillary relief generally; and the recognition and enforcement of foreign decrees or orders by French and English courts, again with consideration also of allied matters. A Preface by Professor René David and comprehensive tables of sources and contents complete a work, the general lay-out of which, it is perhaps unnecessary to add, is marked by the clarity which appears to be *de cursu* in a legal text produced in France. For the reader who wishes to know what are the rules of French or English private international law upon any point concerned with divorce or separation, here is the book.

And yet one lays down the work with a sense of disappointment. Mainly, this is because of Dr. Benjamin's method, which is to set out on each problem first the rules of French law and then those of English law, in separate sections or chapters, indicating as they occur the points of divergence between or coincidence of the rules of each system. If left at that, this has its defects as a *modus operandi*. For, while it allows for the demonstration of what may, without disrespect, be termed the more obvious points of comparison and contrast, it does not appear to be adapted to going very far below the surface. For instance, the contrast between the French liberality in the matter of jurisdiction but particularity in choice of law (resulting in nice problems where parties to a suit are of different nationalities, stateless or of multiple nationality) and the English preoccupation with the problem of jurisdiction and relative unconcern over choice of law—both in the matter of themselves entertaining petitions and in the recognition of foreign decrees—is thrown into clear relief: so also with the consequence that either different problems engage the attention of the two sets of courts or that the same problem appears as one of choice of law in France while in England it arises on the plane of jurisdiction. But these surely are inevitable results of the basic difference of technique, which, though certainly requiring note, must essentially be accepted and proceeded from. The really interesting thing is, what happens then? And that question, unfortunately, usually remains unanswered. On a pure question of internal law, for example, in the first place, one would like to know whether the "*causes très restreintes*" of

divorce in England do make divorce much more difficult to obtain on this side of the Channel (pp. 10-11)—if, that is, one takes into account not only the words of the statute setting out the grounds of divorce but also the flourishing concept of constructive desertion and some recent kinds of cruelty. Or again, on the thorny problem of polygamous marriages, which incidentally might have received rather more attention, one will seek in vain for a consideration of just how, in the result, France and England compare. Presumably, in France where the courts do not deny jurisdiction but would, through the operation of the concept of *ordre public*, refuse to grant decrees, a change (albeit unlikely) in the latter concept could produce a change of practice: perhaps, indeed, *ordre public* would not prevent the dissolution of a *de facto* monogamous marriage. But that the reader must deduce for himself from p. 20 and p. 59, n. 182. This preoccupation with the rules as such gives the work a distinctly unpractical flavour.

This tends to characterise also the individual treatment of particular topics. In the matter of English divorce jurisdiction, for instance, the principles of domicile are explained, with references to *Winans v. Att.-Gen.* [1904] A.C. 287, etc., and the difficulty of ousting a domicile of origin. True, there follows the sentence (p. 45) "*On peut néanmoins discerner une tendance plus libérale à cet égard dans certaines décisions récentes.*" Now could not this last, in fact, be further developed rather than be followed by the surely now dubious observation that it is generally easier to find oneself attributed a domicile of choice in the Commonwealth than in a foreign country, for which reference is made to *Whicker v. Hume* (1858) 7 H.L.C. 124? In recent reported decisions from, say, *Cruh v. Cruh* (1945) 62 T.L.R. 16, how often has the problem of domicile prevented an English court from entertaining a petition for—or, for that matter, recognising a foreign decree of—divorce? The point is important because the defects of the English concept of domicile and judicial insistence on the matter recur throughout the book. Surely, for effective comparative purposes, the important thing is not the rules as such but the way in which they operate or, at least, are made to operate.

This, in turn, leads to a further point. Doubtless because it is written with a view to a French public, certain concepts of French law are virtually assumed or cursorily dealt with, while their English counterparts get a fuller treatment, which leads to unbalance; in particular is this the case with the notions of domicile and *ordre public*. The treatment of English domiciliary principles and practice has been mentioned: of the French concept of domicile—which is important in the light of such developments as the approval by the Cour de cassation in *l'affaire Rivière* (1953) of the selection of the law of the domicile as the *lex causae* in the divorce of two persons of different nationality—nothing is said. Similarly, apart from being told that the English concept of public policy is narrower than that of *ordre public*, the reader forms his own impression of the latter convenient and Protean notion. Equally, in the light of the strictures on the English law of domicile, it is interesting to note that the manner in which the theory of *la fraude à la loi* (when operative in this field) apparently operates only in favour of France passes without comment.

A distinguished English comparative lawyer has been known to say that comparative law confirms him in his initial conviction of the excellence of the common law. Dr. Benjamin does not share that view in what concerns the subject-matter of his study. Everyone is, of course, entitled to his own opinion and certainly Dr. Benjamin is not alone in his strictures on this branch of English private international law: most English scholars have hurled at least an occasional brick at this ever-popular Aunt Sally. No one would claim that the position is ideal; but one cannot avoid the impression that the features above referred to result, in this work, in a gloomier picture than current practice suggests.

J. A. C. THOMAS.

THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND IN ITALY. A Comparative Study. By SERIO GALLEOTTI, D.PH., DR.JUR.(Milan). With a Foreword by PROFESSOR F. H. LAWSON. [London: Stevens & Sons, Ltd. 1954. xi and 249 pp. 30s.]

AFTER spending two years of research at Oxford into aspects of English administrative law, Dr. Galeotti has written, in a language that is not his own, a distinguished and profoundly interesting work. Not only has he enlightened us on the main features of Italian administrative law; he has also suggested a wider significance for some English doctrines which most of us tend to regard as nothing more than chance products of historical circumstance. It is impossible to read his book without learning something new about English public law. And it is pleasant to read an appraisal of judicial review in England by a foreign author who has mastered his English law and who views it with critical but sympathetic discernment. Unlike many other foreign observers, Dr. Galeotti is fully aware that in England the impact of the administrative process upon the citizen is not to be measured exclusively by reference to the scope of judicial review of administrative action; and he shows nothing of that censorious disapproval which English lawyers once reserved for *droit administratif* and which the Continental lawyer is now apt to return from across the Channel. He points out that "If it is true that the Italian citizen, as opposed to the English, is afforded wider opportunities of attacking an administrative decision after it has been taken, it is equally true that he has almost no chance of influence in the process of its making." The Italian administrative process is more secretive—the public local inquiry is almost unknown, prior consultation of interests affected by proposed administrative action is comparatively undeveloped and the pattern of local government is vastly different—and relations between the bureaucracy and the citizen are generally far from amicable. But the inferiority of internal, procedural and political safeguards against administrative arbitrariness in Italy is, in some measure at least, offset by the broad superiority of the Italian system of judicial review.

In Italy jurisdiction to review administrative action is shared by the ordinary courts and the *Consiglio di Stato*, a body that has a fairly close resemblance to the French *Conseil d'Etat*. The ordinary courts have exclusive jurisdiction over acts done by the Administration in its "private" capacity (e.g., matters arising out of ordinary contracts), and over claims by the citizen that his legal rights (*diritti*) have been infringed by the Administration. The courts may award the citizen damages or compensation and may issue declaratory orders against the Administration, but in general they have no power to quash or prohibit administrative action. The *Consiglio di Stato*, on the other hand, concerns itself not, as a rule, with legal rights but with *interessi legittimi*, individual interests (e.g., to enjoy the amenities of a neighbourhood, to receive a permit or licence) that are protected by law because of their direct connection with a public interest which the law will protect against violation by a public authority. The *Consiglio di Stato* may annul an administrative act or order and in some cases may vary an order or substitute its own. It has no power to issue declaratory judgments or to award monetary sanctions other than costs against the Administration. Conflicts of jurisdiction are determined by the *Corte di Cassazione*, the highest civil court.

In some respects the machinery of judicial review in England compares favourably with the Italian. It is seldom necessary in England for a citizen to have to go before two or more separate tribunals to dispose of his claim against a public authority. Proceedings in the High Court are dealt with more expeditiously (though more expensively) than in the *Consiglio di Stato*. Moreover, the English judicial remedies, encumbered as they are by an

appalling mass of technicalities, are richer and on the whole more effective than the Italian. Mandatory and prohibitory remedies are rarely available in Italy, for Italian law is concerned essentially with the legality of the formal administrative act, whereas English law often addresses itself to the actor. The declaratory judgment in England has a far wider scope than in Italy. The English rules governing *locus standi* in administrative law are more liberal than in Italy, though more conservative than in France. The English concept of natural justice is on the whole more comprehensive than any comparable Italian concept.

Yet the number of cases brought before the *Consiglio di Stato* each year vastly exceeds the number brought before the High Court. No doubt one reason for this disparity is the existence in England of better opportunities for securing extra-judicial redress. But there are other reasons, too: above all, the wider range and deeper penetration of judicial review in Italy. A candidate who has failed in a public examination, a military officer who has been passed over for promotion, may bring his complaint before the *Consiglio di Stato*. Only a very limited group of discretionary acts is regarded as unreviewable. Statutory formulae purporting to oust judicial review of administrative action are nullified by the Italian Constitution. The grounds on which the *Consiglio di Stato* may quash administrative decisions have been enumerated in detail, and the establishment of several independent categories of invalidity has encouraged the *Consiglio* to probe more searchingly than might have been the case if it had felt itself obliged to confine its inquiry to the question whether the Administration had acted *ultra vires* or in excess of jurisdiction. Review of findings of law and fact is not limited, as in England, to jurisdictional matters and errors of law on the face of the "record." Although the *Consiglio* in general disclaims any power to examine the merits of the exercise of a discretion, it will often in practice assume such a power when it considers whether a decision is tainted by the absence of any factual basis or by manifest injustice or illogicality. The jurisdiction of the English High Court in administrative law is fundamentally supervisory; the *Consiglio di Stato* appears to have some of the characteristics of an appellate tribunal.

Perhaps the most striking difference between the two systems (other than the characteristic dissimilarity of procedure in litigation) is the greater readiness of the *Consiglio di Stato* to draw unfavourable inferences from the conduct of public authorities. A decision may be quashed for absence or insufficiency of reasons; in England, an administrative body may establish an impregnable position merely by abstaining from giving reasons for its decisions. If an Italian administrative authority refuses to produce a document sought by the party impugning its conduct, the *Consiglio* will act on the assumption the plaintiff's allegations are true. There may be a lesson here for English law reformers. Another ground of invalidity is the inconsistency of an administrative decision with a previous or contemporary decision on the same subject-matter, to the extent that such inconsistency is evidence of misapplication of power (*sviamento di potere*). In the result it is easier to establish abuse of administrative discretion in Italy than in England, although the formal scope of review on this point differs but little in the two systems.

Dr. Galeotti's treatment of the English case-law is often admirable. A few of his observations are, however, open to challenge. *Bagg's Case* (1616) preceded *Dr. Bentley's Case* (1723) as an example of the application of the *audi alteram partem* rule to the proceedings of a non-judicial body (p. 164). The importance of the decision in *Arlidge's Case* is overstated (pp. 169-170), and it is wrong to say that the *audi alteram partem* has been invoked only twice to quash administrative decisions since that case was decided; the rule has been applied to quash such decisions six times since 1939. It is impossible to accept the view that the rules against bias or interest cannot be applied

except in "triangular" situations (pp. 171-172). An unsuccessful applicant for a licence can certainly have the licensing authority's decision quashed if he subsequently discovers that members of the authority have a pecuniary interest in the matter or if members have shown partisanship against him (*cf. Frome United Breweries Co. v. Bath JJ.* [1926] A.C. 586), even though there were no third-party objectors to his application. The rule about disqualification for bias is less strict than the author believes (pp. 175-176); see now *R. v. Camborne JJ.* [1955] 1 Q.B. 41. It is doubtful whether English rules on relator actions and *locus standi* in applications for prohibition justify the broad conclusion that the primary object of judicial control over public authorities in England is the protection of the general interest, public good and order, as distinct from the interests of individual citizens (p. 210). Nevertheless, it is interesting that a continental lawyer should deem these features of the English system of judicial control to be significant enough to place it among the *juridictions de droit objectif*.

The publishers are to be congratulated on making this excellent study available to English readers. At least one of these readers regrets that there is no index or table of cases, for he will turn its pages many times.

S. A. DE SMITH.

AMERICAN GOVERNMENT. Its Theory and Practice explained for the English Reader. By RICHARD H. PEAR. [London: McGibbon and Kee. 1955. 209 pp. 15s.]

THIS short book is admirably suited to the needs of the student of law or politics desirous of getting a clear and general understanding of the American system of government. It is as near to the American Constitution without tears as any book "for the English reader" (as the sub-title proclaims) could possibly get. Mr. Pear has explained all those things which most need explanation and has included, in a number of useful appendices, additional aids to understanding for which one looks in vain in most books on the American Constitution. In addition to the text of the Constitution itself and of its twenty-two amendments (Appendix I) he appends a brief account of the government of the thirteen colonies (Appendix II), an outline history, in tabular form, of American political parties (Appendix III), a list with potted biographies of the Presidents of the United States, with the names of their principal opponents (Appendix IV), and a list of Departments and Agencies of the United States Government (Appendix V), while on p. 202 appears a map giving the number of presidential electors in each state and the date of admission of each to the Union.

The *Notes* at the end of the book contain (besides useful bibliographical information) a short list of some thirty of the most important cases having constitutional significance that have come before the Supreme Court. Mercifully Mr. Pear has included adequate references to these cases. Nothing is more infuriating to the lawyer (or indeed to the layman) than to have thrown at him such bald and airy references as "*Marbury v. Madison*" or "*Schlechter v. U. S.*" without either case number or date; but Mr. Pear could perhaps have been even more explicit and have included the long titles of such collections of cases as "Cranch," "Wheaton," "Peters," "Howard" and "Wallace." These works are not very accessible in this country, which gives an added reason for the fullest possible references to be given.

Mr. Pear's plan is workmanlike and straightforward. He begins, as should every commentator writing a beginners' book on the United States Constitution, with an account of the issues, conflicts and compromises in the Philadelphia Convention of 1787, which spawned the Constitution, and he exhibits throughout his book a commendably strong sense of history—as befits

a pupil of Marriam in Chicago and of Laski in London—such as too many purely analytical studies of the American System of Government lack.

This is not a book to challenge comparison either in scope or in authority with D. W. Brogan's *Introduction to American Politics* (Hamish Hamilton, 1953), which, despite its title, is heavy sledding for the beginner, though the more one knows about American government and history the more one enjoys that remarkable book. Mr. Pear might modestly claim that he has written "An introduction to *An Introduction to American Politics*"—the book which no Brogan aficionado ought to be without—and this in itself would have been a useful achievement. But, in fact, Mr. Pear has done much more. His is just about the best book that has as yet appeared on its subject that is specifically designed for the English reader and for the beginner.

JOHN A. HAWGOOD.

THE LAW OF NATIONS. Fifth Edition. By J. L. BRIERLY.
[London: Geoffrey Cumberlege, Oxford University Press.
1955. ix and 331 pp. 15s.]

THE DEVELOPMENT OF INTERNATIONAL JUSTICE. By SIR ARNOLD
DUNCAN MCNAIR. [New York: New York University Press.
1954. 34 pp. \$2.50.]

It is one of the great merits of the late Professor Brierly's book, *The Law of Nations*—of which the second title is *An Introduction to the International Law of Peace*—that it is possible to read each successive edition with the certainty of enjoying, and benefiting from, the work as a whole, and not merely with the purpose of finding out how the new edition differs from the last. The book retains this youthful and refreshing quality because it treats the most fundamental questions of international law with a penetrating simplicity that is sometimes lacking in the weightier textbooks. Professor Brierly always seemed to preserve a happy balance between optimism and pessimism; between exaggerating the part played by international law on the one hand, and on the other hand of despairing of international law and dismissing it as academic and irrelevant. He also avoided quack and doctrinaire solutions but never failed to see that each of the more dogmatic "schools" of international law contains something that is of value.

Of the changes made since the last edition appeared the most important are those relating to the continental shelf, territorial waters and codification. On the continental shelf Professor Brierly is in general agreement with the proposals of the International Law Commission on which he served with distinction until a few years ago, although it is interesting to notice that he joins with many other international lawyers in criticising the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries* case. He considers that judgment to be an innovation in the law and unsupported by authority. Although he concedes that the court laid down that the validity of the determination by a State of its territorial waters ultimately depends upon international law, he expresses the view—and the facts have hardly proved him wrong—that "this rather half-hearted attempt to save the ultimate authority of international law affords a fragile safeguard against the dangers implicit in the essentially subjective character of the new test which may well serve as an invitation to States to put forward extravagant claims to appropriate areas of the open sea" (p. 176). As regards codification, experience on the International Law Commission had apparently given Professor Brierly little cause for optimism. If anything it seems to have made him more than ever aware of the obstacles to codification and also of the fact that the Hague Codification Conference of 1930 "probably did more

harm than good, and a repetition of it is not to be lightly undertaken" (p. 81). As to what could be done in present circumstances he thought that the best hope lay in obtaining series of statements of the law by independent experts.

This latter approach to the problem of codification was also favoured by Sir Arnold (now Lord) McNair, the former President of the International Court of Justice, in the second of two lectures given at New York University in December, 1953, under the general heading of "The Development of International Justice." (The first lecture is entitled "The Development of International Tribunals" and the second "The Development of the Law.") Lord McNair distinguishes between three possible methods of developing international law. These are (i) the accumulation of case-law, (ii) codification by conventions, and (iii) codification by restatement. Describing himself as "an unrepentant believer in the quality of case-law," Lord McNair naturally prefers the first method, although he rightly points out that its efficacy is diminished by two circumstances which could, in fact, easily be removed. The first of these is the fact that, despite the publication of the International Law Commission's report on "Ways and Means for Making the Evidence of Customary International Law More Readily Available," international case law is still not easily available to the average practitioner. Hence the tradition of relying on professorial textbooks dies hard. The second circumstance is that case law is best developed by interchange of comment between judge and counsel, whereas, as Lord McNair observes, most international tribunals deny themselves this "very precious aid." On codification by way of conventions Lord McNair is no more optimistic than Professor Brierly, but he thinks that the time may be opportune for an unofficial organisation to attempt a restatement of various branches of international law along the lines of the Harvard Research.

In his other lecture Lord McNair naturally felt obliged to say nothing of controversies affecting the International Court of Justice. But it is none the less significant that he singled out for discussion Article 31 of the Statute (which deals with *ad hoc* judges) and Article 34 (which deals with the right to litigate before the Court). Lord McNair is probably not mistaken in thinking that governments might be prepared to abolish, or at any rate to modify, the system of *ad hoc* judges, but that they will be very reluctant to permit any change in the present practice whereby private persons are prevented from suing States before the Court unless they can first persuade their own government to sponsor their claim.

D. H. N. JOHNSON.

INTERNATIONAL LAW. By L. OPPENHEIM. Volume I: Peace.
Eighth Edition by H. LAUTERPACHT. [London: Longmans,
Green & Co. 1955. vi and 1072 pp. £4 10s.]

THE appearance of a new edition of either volume of Oppenheim's famous treatise is always an important event in the world of international law. When, however, a work is as well known as is this one, the reviewer's task is not so much to appraise the merits of the work as a whole as to draw attention to the principal changes made since the last edition. The reviewer may also be expected to comment upon the question whether the continued re-editing of an old work still has a useful part to play under modern conditions.

The principal changes made include the elimination of references to the older textbooks, monographs and articles and the substitution of more modern references. An appendix of some sixteen pages containing a list of conventions establishing international unions or dealing with humanitarian matters and the unification of private law, as well as a great many references to the

literature on these subjects, has been sacrificed. There has been inserted instead a new appendix of some fifty pages entitled "Specialised Agencies of International Co-operation and Administration." This appendix gives an analysis, supplemented by biographies, of the constitutions of the specialised agencies of the United Nations and of the Bank for International Settlements, as well as a brief account of the activities of these agencies. It is a useful addition. The sections on the International Labour Organisation have been revised and the list of I.L.O. Conventions, which used to appear as a separate appendix, now appears in rather less detail as a footnote to one of these sections. Since the last edition appeared in 1948 the text itself has naturally undergone a good many changes, particularly in such fields as the law of the sea, human rights and jurisdictional immunities. Thus it is no surprise to find the sentence which formerly read "British and American courts have rigidly adhered to the principle of jurisdictional immunity and have declined to modify it either by distinguishing between activities of the State in the field of private law and activities *jure imperii* or by readily implying waiver of immunity" now qualified by the remark that "the position can no longer be regarded as free from doubt." Indeed, the learned editor even goes so far as to say that "Most States, including the United States, have now abandoned or are in the process of abandoning the rule of absolute immunity of foreign States with regard to what is usually described as acts of a private law nature" and that the position in Great Britain "must be regarded as fluid." By contrast, the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case is introduced somewhat cautiously into the general body of international law, as is shown for instance by the following sentence: "The principle of straight base-lines following the general direction of the coast must henceforth be regarded as having acquired a prominent place in international law, though it is probable that only a further elaboration, in the sense of setting a limit to the length of the straight lines and their distance from the coast, of the principles established by the court in this important judgment can transform it into a working rule of international law."

Professor Lauterpacht comments in his preface that "as a result of these cuts and additions the character of the volume has undergone yet another substantial change" and also that "there may be objection to the continued publication of a treatise in which the sections written by its original author comprise only one-third—or less—of the total contents of the work." In our view, these objections are overwhelming, although we also believe that a very strong case can be made out for reprinting Oppenheim's original treatise simply as a classic of international law. Professor Lauterpacht raises the hope that in due course he will assume full responsibility, under his own name, for a treatise on international law. If this hope were to be realised—as all most sincerely hope it will be—the case against continuing with further editions of Oppenheim would appear to be even stronger. In the meantime, however, the appearance of this new edition is to be welcomed as a useful aid to the study of international law. It will no doubt be welcomed by some as "indispensable to the practitioner." But the present reviewer feels that it is time to consider whether that hackneyed expression any longer represents the truth, and indeed whether it is feasible for practitioners or anyone else to go on expecting single treatises to be written upon so vast a subject as international law. Nobody any longer expects a single treatise to be written on the whole of English law. The time is surely coming, if it has not already come, when the practitioner will have to dispense with such works in the field of international law. That being so, the questions which all international lawyers should be considering are how best to arrange and present the available material, the most satisfactory division of effort between preparation of monographs, collation of reports of cases, editing of digests of State practice and so on.

D. H. N. JOHNSON.

THE INTERNATIONAL LAW OF THE SEA. Third Revised Edition. By
C. JOHN COLOMBOS. [London: Longmans, Green & Co. 1954.
xvi and 719 pp. 50s.]

THE third edition of this well-known work is the sole responsibility of Dr. Colombos, and the late Professor Higgins is no longer treated as a co-author. In view of the explanations given in the Foreword by Lord McNair, who was one of Professor Higgins's executors, this was inevitable. It appears that the original manuscript, found among Professor Higgins's papers in 1935, formed merely "the nucleus of this book." Moreover, "he did not appear to have worked upon it since 1907," *i.e.*, since before the First World War. The reader cannot judge whether in these circumstances there was at any time any justification for describing Professor Higgins as a co-author, but he can well imagine that there was none when the third edition appeared in 1954.

Whoever may have been responsible for defining the character of this book, Dr. Colombos has certainly not changed it. This has always been, and still is, a textbook on traditional lines which is primarily a guide to Anglo-American practice, though foreign material is by no means ignored. On the whole, the book is a reliable guide. However, the important decision of the Privy Council in *Molvan v. Att.-Gen. for Palestine* [1948] A.C. 351 contains much more than can be gathered from the very short sentence on p. 54, note 4, where the case, cited as *The Asya* (1948) 81 L.L.R. 277, appears under the heading "Rules adopted by international bodies." Or, to take another example, the reader of sections 220 to 228 dealing with immunity will not find it difficult to think of many points which could, and ought to, have been made to complete the picture. (Incidentally, the Index does not contain a reference to immunity nor does the Table of Cases mention *The Cristina*.) It is in line with the general character of the book that the author does not aim at analysis or critical treatment of his material. Yet there are, happily, occasions when he does not suppress his own views. Thus, in some of the new sections, the reader will find short but helpful comments on such problems as the Continental Shelf (pp. 58 *et seq.*) or the implications of the *Norwegian Fisheries* case (p. 89).

There cannot be any doubt that the new edition will greatly add to the weight and authority which this standard work has attained and deserves to enjoy not only in this country but also abroad. It is satisfactory to learn that translations have appeared in France and Italy and are in preparation in Germany and Spain.

F. A. MANN.

PROFESSIONAL NEGLIGENCE. By J. P. EDDY, Q.C., with a Foreword
by SIR ALFRED DENNING. [London: Stevens & Sons. 1955.
140 pp. 13s. 6d.]

IN January and February, 1955, the author was invited to deliver the Travers Memorial Lectures, an annual group of lectures on commerce or commercial law, which was made possible by a fund raised as long ago as 1854. Five lectures were given by the author and these make up the book, together with slight additions which include cases decided between the date of the lectures and the date of publication.

General principles of negligence take up the first chapter, and after an introduction to *Donoghue v. Stevenson* the author is careful to point out that the concept of a general duty of care is confined to cases where danger results to life, limb or health only; for this reason an action against a professional man is usually framed in contract. Denning L.J. refers to this in the Foreword, but with respect to the learned Lord Justice is it strictly

correct to say that "factory cases" are actions in tort, for does not the duty owed by an employer to his servant arise *ex contractu* just as much as that owed by a solicitor, say, to his client? (And are factory owners really liable "simply because something happens to go wrong"?) It would seem, however, that it is still open to the House of Lords to reject the interpretation put upon *Donoghue v. Stevenson* by Wrottesley J. in *Old Gate Estates, Ltd. v. Topliss and Harding and Russell*, although *Derry v. Peek* might be said to stand in its path. It is curious, in passing, that the author does not refer to *Derry v. Peek* at all. Short discussions of vicarious liability and the doctrine of *res ipsa loquitur* conclude this general chapter.

In the remaining four chapters the author considers the extent of the duty of care owed by members of each profession; by barristers and solicitors, by bankers and accountants, by the medical profession, and by architects, surveyors, engineers and others. The duty owed by an accountant, it is said on p. 61, is to exercise such care and such skill as a reasonably competent accountant would exercise, and the impression is given by this and other passages that the standard is determined by what an average member of the profession thinks ought to be the standard; but is this right? The employers' liability cases show that the courts have not been afraid to say that the usual and normal precautions taken by an employer have been insufficient, and that the standard is to be determined by the court and not by the consensus of opinion among even prudent employers. This point is certainly sufficiently important to be worth making in lectures such as these.

The "new look" that has come over the hospital cases since *Cassidy v. Ministry of Health* facilitates discussion of the liability of medical authorities. To show the change in the law the author refers to the 1906 case of *Evans v. Liverpool Corporation*, where a boy suffering from scarlet fever was prematurely discharged from the defendants' hospital; he passed on the infection to his brothers, and his father unsuccessfully sued for expense incurred in treating the brothers. The court there held that the defendants' duties comprised only the provision of reasonably skilled and competent attendance for patients. But even if the courts were to hold now that the premature discharge of a patient showed lack of care and a breach of a duty owed to that patient, it is far from certain that the father would have his remedy.

It is unfortunate that in setting out the facts of *Hillyer v. St. Bartholomew's Hospital* the author fails to state that the surgeon was selected by the plaintiff himself, and was asked by the plaintiff to make the inspection; the request was not made to the hospital authorities. Although the reasons given by Grantham J. and by Farwell and Kennedy L.JJ. have not been followed since *Cassidy's* case, the bare facts of the case and the actual decision commended themselves to Denning L.J. in *Cassidy's* case; namely, that where a patient himself selects and employs the doctor or surgeon, the hospital authority is not liable because it does not employ the doctor or surgeon. After much doubt has been cast upon it, *Hillyer's* case now appears to have taken on a new lease of life.

Jones v. Manchester Corporation and the indemnity of hospital staffs to the authority employing them is discussed, although this topic appears to be of little practical importance since the Ministry of Health issued a directive to medical staffs, reference to which is omitted.

Since the author is primarily concerned with the extent of the duty of care, it is but natural that little space is devoted to damages. He is careful to point out, of course, that the fact that some damage has accrued is essential to an action for negligence, and that a breach of contract which has resulted in no damage gives rise to a claim for nominal damages only. But it remains a mystery why three pages entitled "The Question of Damages" should appear in the middle of a chapter called "Other Professions" and be sandwiched between "Engineers" and "Valuers."

On p. 30 the author draws attention to the repeal of the limitation period of one year in respect of actions against public authorities, but it is not until p. 113 that he makes it clear that the repealing statute substituted a period of three years. And is it right to say, on p. 111, that the defendants in *Higgins v. North West Metropolitan Hospital Board* and *Razzell v. Snowball* unsuccessfully pleaded the limitation period?

Although this book cannot replace the practitioners' standard works, nor was it intended that it should, it is a lively, well-written, up-to-date and modestly priced essay on its subject.

ALLISTER LONSDALE.

THE LAW OF ROAD TRAFFIC. By M. R. R. DAVIES. [London: Shaw & Sons, Ltd. 1954. xlvii and 330 pp. with (index) 17 pp. 30s.]

LEGISLATIVE activity in the realm of road traffic is notoriously sporadic and unco-ordinated. This, coupled with the minute but subtle distinctions buried away in the mass of judicial decisions dealing with this branch of the law, makes road traffic a logical contender for the place once occupied by workmen's compensation. Imbued with the laudable object of helping the practising members of the legal profession find their way through this conglomeration of authorities the author of this work has set himself the task of reducing the law into a compact and easily accessible form. In this he has undoubtedly succeeded. But let no enlightened student of the law regard this book as worthy of his attention. It has all the deficiencies so often associated with practitioners' treatises, not the least of which is the practice of reducing nearly every case to a highly concentrated headnote. Treated as a rough-and-ready guide this system of presenting the law may have some value, but what hope lies in this direction of converting the lethargy of the reader into industrious studying of the cases for himself, with a view to making up his own mind as to what the cases decided?

Part I of the book is devoted to collecting together the various duties and responsibilities imposed by law upon the drivers of motor-vehicles. As might be expected, it is very much a mixed bag and includes most, but not all, of the variegated road traffic offences. Then there are the multitude of regulations governing the construction and user of motor-vehicles, pedestrian crossings, compulsory third-party insurance, and the registration and licensing of motor-vehicles. A whole chapter is devoted to the new Highway Code, and forcible reminders confront the reader as to the number of people killed or injured each year as the result of a violation of one or other of the Code's provisions. Part II deals with motor manslaughter and more detailed attention is here given to the familiar offences of careless, dangerous and reckless driving. In so far as this section gives the bare bones of the law relating to these crimes, the reader will have little ground for complaint. But what is sadly lacking is an indication of the difficulties experienced in distinguishing between the different degrees of negligence embodied in the respective offences. And in the analysis of manslaughter the author is content to cite at length the relevant passages from Lord Atkin's judgment in *Andrews v. D. P. P.* [1937] A.C. 576. The inadequacies of that judgment have been exposed by writers and judges (see, for example, *People v. Dunleavy* [1948] Ir.R. 95), and some discussion along these lines would help to present a more balanced picture of the law.

The application of contractual and tortious principles to road traffic problems forms the basis of Part III of the book. Here the author expounds the law concerning questions of title, and conditions and warranties arising out of the sale of new and second-hand cars. But it is somewhat odd to find problems of bailment, associated with the parking of vehicles, being dealt

with in a chapter entitled "the contractual rights of motor-vehicle owners." All the cases dealing with the familiar questions associated with tortious liability for road accidents are competently marshalled together—separate sections are devoted to *volenti non fit injuria*, contributory negligence, casual delegation, nervous shock and damages. Presumably believing that the ordinary member of the profession is not interested in a critical analysis of the authorities, the author has stuck to his task of merely stating the law in as succinct a form as possible. It is all the more surprising, therefore, to come across the very occasional departure from this highly practical approach. One instance is the attack (pp. 260–263) made on the principle that in road accident cases trespass is only actionable if proved to have been committed negligently—the view being advanced that, whereas it is a good defence to such an action of highway trespass to prove the absence of any lack of reasonable care, it should be no part of the plaintiff's duty to establish negligence as part of his case. Strong criticism is also expressed (pp. 157–160)—with some justification—of the line of English decisions dealing with the offence of being "in charge of" a motor-vehicle when under the influence of drink or drugs, etc. The difference in the approach of the High Court of Justiciary is evident from the cases cited, a striking example of the failure to achieve what the present Lord Chief Justice has repeatedly stated should be the aim of the English Divisional Court, *viz.*, uniformity of interpretation in relation to offences having common application on both sides of the Border.

Then, finally, in Part IV there is an extremely useful statement of the principles dealing with compulsory third-party and motor insurance generally. Also, there is an exhaustive selection of cases illustrating the application of the "special reasons" formula in the offence of permitting a motor-vehicle to be used on the highway without an effective third-party insurance policy. But throughout the book there is no reference to the equally frequently invoked offence of permitting a motor-vehicle to be used as an express carriage without a road-service licence except "on a special occasion." In addition to the more limited question of "special reasons" and "special occasions" there has arisen a considerable divergence of judicial opinion as to the necessity for *mens rea* in the form of guilty knowledge of the constituent elements of the respective offences. In the opinion of the reviewer this question is of cardinal importance and yet, on reading this work, no impression is given that such a problem exists. That the Divisional Court, at any rate, is acutely aware of this perennial problem of *mens rea* or absolute prohibition in statutory offences is apparent from a study of such recent cases as *Evans v. Dell* [1937] 1 All E.R. 349; *Reynolds v. G. H. Austin, Ltd.* [1951] 2 K.B. 135; *Roper v. Taylor's Central Garages* [1951] 2 T.L.R. 284; and *Browning v. J. W. H. Watson (Rochester), Ltd.* [1953] 1 W.L.R. 1172, not one of which receives even a mention by the author.

And yet, with all these criticisms, the reviewer is all too conscious of the fact that, judged by the strictly utilitarian purpose set out to be achieved by the author, this book will probably succeed to a degree unlikely to be achieved by an approach along the lines suggested in this review. There is nothing unusual or novel in this, but we need to remind ourselves of it all the same.

J. LL. J. E.

MOTOR CLAIMS CASES. Third Edition. By LEONARD BINGHAM, Solicitor of the Supreme Court. [London: Butterworth & Co. (Publishers), Ltd. 1955. xlvii and 660 pp. (including index). 55s. net.]

It will come as no surprise to lawyers that this book has now happily reached its third edition. During the nine years since its first appearance in 1946 (first and second editions reviewed here in Vol. 10, p. 343, and Vol. 14, p. 373,

respectively), Bingham's *Motor Claims Cases* has established itself as a classic in that particular branch of the law, and still remains an invaluable guide to practising lawyers and insurance officials, for whom it is primarily intended. This latest edition not only maintains the high standard set by previous editions, but improves upon them in many respects. It is remarkable that, whereas the present volume is only nineteen pages longer than that of the second edition, a great deal of new material, collected with Mr. Bingham's amazing thoroughness and care, has been incorporated. The general approach to the subject is the same as before, an approach, let it be confessed, that is not calculated to attract the academic lawyer. However, this is inevitable if its usefulness as a work of reference for practitioners is to be left unimpaired. The author has taken the opportunity of improving the general classification of the material by increasing the number of chapters from six to fourteen, although the test of classification, on the whole, still remains practical utility rather than academic elegance. Their headings will give an idea of the field covered: 1. Negligence, 2. Liability of the Motorist, 3. Claims by the Motorist, 4. The Crown, Public Authorities and Limitations, including the 1954 Act, 5. Damages: General Principles and Damage to Property, 6. Damages: Personal Injuries, 7. Damages: Fatal Accidents, 8. Evidence, 9. Some Practical Points, 10. Legal Aid and Advice Act, 11. Road Traffic Acts, 12. Arbitration, 13. Conversion, 14. Other Insurance Points. Naturally this result was only achieved by drastic pruning which, on the whole, has been carried out very well. Few practitioners, for instance, will regret the disappearance of the black-out cases or the texts of the Road Traffic Acts, the Crown Proceedings Act, etc., which are now easily accessible elsewhere. As has been said before in these columns, it is in its details that the interest of this book lies. The busy practitioner is likely to find it concise, informative and up to date. Mr. Bingham and Messrs. Butterworths have again placed the legal profession in their debt by bringing out a new edition of this valuable book.

A. G. CHLOROS.

THE LAW OF PRIMITIVE MAN. A Study in Comparative Legal Dynamics. By E. ADAMSON HOEBEL. [Cambridge, Mass.: Harvard University Press; London: Geoffrey Cumberlege. 1954. viii and 357 pp. 45s. net.]

PROFESSOR E. ADAMSON HOEBEL is an eminent American anthropologist who, by field studies and research, has done much to throw light on what he calls "the law-ways" of primitive, non-literate peoples, especially among the American Indians. In the present important work, after discussing methods and techniques for the study of primitive law, he considers, by way of selective comparison, the legal situation among five distinctive and widely separated societies: the Eskimos in the North, the Ifugao in the Philippines, the Comanche, Kiowa and Cheyenne Indians of the Western Plains of the United States, the Trobriand Islanders in the South-west Pacific, and the Ashanti of West Africa. All these communities are fully analysed (within the inevitably narrow limits of available material) by way of case studies, and indeed this case law approach familiar to Anglo-Saxon lawyers is undoubtedly more promising than most others when dealing with primitive and even with ancient law.

Putting forward, in later sections of his book and in the light of the evidence afforded by these primitive societies, a great number of highly interesting general observations concerning the nature and evolution of law, Professor Hoebel writes: "If ever Sir Henry Maine fixed an erroneous notion on modern historians, it was the idea that primitive law, once formulated, is stiff and ritualistic (and by implication weak in juristic method).

The sample of case materials set forth in this book has surely shown . . . (that) in most primitive trouble cases the situation is surprisingly fluid, but flowing within channels that are built by the pre-existing law and moving to a reasonably predictable settlement. The channels, however, shift and bend like the course of a meandering river across the bed of a flat flood plain, though flowing ever in a given direction. Men are at work on the law."

"Purposive definition of personal relations is the primary law job" and it is plain that such an explicit statement of relations which "sets the expectancies from man to man and from group to group" is achieved slowly and with difficulty among simple hunters and food-gathering tribes. Thus the author sees the chief problem even of the Red Indian tribes which he discusses (and which include in some ways highly organised hunters) in "the dilemma that rested in the incompatible values of individual aggressiveness and military glorification and the ideal of internal peace and democratic order." The law of things begins to rival the law of persons in social significance only in a higher state of development, namely among sedentary and horticultural societies; it is usually there that we find a clearcut trend towards composition in the form of property as opposed to revenge or physical coercion.

In most tribes in their early and middle stages of evolution, society is not yet, Professor Hoebel points out, so organised that preponderant power to apply sanctions against recalcitrant elements is anything like surely and invariably in the hands of official agents of the community. Indeed, he says, "the elemental postulations of the supernatural also appear as jural postulates in all type systems" here analysed. The relation of the law to the supernatural may be complex or direct (as it is, for instance, among the Ashanti "where every legal prescription and order must, nominally at least, be squared with the ethics and requirements of religious belief"), but it is almost invariably close. Thus we are told that among the Ashanti, oath naming being a criminal offence, "any citizen who happened to be around was under a royal duty to make an arrest. Not to do so was (also) an offence, but we are not told to what penalty it was subject." Indeed any sanctions there might be seem often to be left to superhuman forces, *i.e.*, the assertion of a belief that a person who had committed an "offence" would suffer bad luck, fall ill or die by the agency of some "spirit beings." This inevitably raises once again the question where law in the full sense begins; though this problem is not shirked in the volume at hand, no convincing final answer is to be expected: "the internal growth of various types of control organs to meet felt social needs" is in truth part of the dynamics of an emergent society.

A striking feature common to all systems discussed in *The Law of Primitive Man* is the extreme weakness, or even absence, of techniques for objectively determining the fact of any issue. Even the most highly developed form of trial here described (that among the Ashanti) seemed to rest on the calling of a single witness who apparently could not under any circumstances be challenged, thus giving him an importance which might well seem, as the author says, "almost incredible."

It is a pity that in his concluding pages, Professor Hoebel yields to the temptation of arguing, from the practices of certain primitive societies, say from the Ifugao methods of mediating disputes between kin groups which he has so graphically explained, to the forthcoming emergence along similar lines of a world law: One Law in One World. And when the author ends by asserting: "The science of comparative legal dynamics is called upon to add its catalytic effect to the crystallising metamorphosis from primitive law to modern on the plane of world society" the reader, without being a sceptic, must be allowed his reservations, linguistic and otherwise.

H. A. HAMMELMANN.

OUTLINES OF MUHAMMADAN LAW. Second Edition. By ASAF.
A. A. FYZEE. [O.U.P. 1955. 28s.]

THE subject of this book is the law applicable to Muslims in India and Pakistan, that is to say one of the various forms which Islamic law has assumed at the present time in different parts of the Muslim world. These legal systems have developed their own essentially individual characteristics, but all rest on the same common foundation of the *Sharī'a*.

A true understanding of this particular development (often termed "Anglo-Muhammadan Law") must therefore be based on an adequate appreciation of the pure *Sharī'a* itself and some knowledge of the systems in force elsewhere, and it is a commendable feature of the new edition that it goes somewhat further than the old edition in both these respects. Doctrines held and rules applicable in India today are contrasted with those of the pure *Sharī'a*, and there is more reference to the "classical" texts. The author, however, might well have treated other matters in a similar way. For instance, the remarks concerning *Ijtihād* and *Taqīd* (p. 27), the definition of *Fiqh* and the distinction drawn between it and the *Sharī'a* (p. 21) represent the view of modern Indian scholarship rather than the strict traditional doctrine, and some adequate reference to the latter might have been made with advantage. The greater regard shown by the author in the new edition for variant Hanafī doctrines and doctrines of the other schools of law itself serves to modify what (on p. 66) is surely an understatement, that "occasionally differences of opinion among the authorities are to be found." But, while not suggesting in any way that this comparison of the Hanafī and Ithnā 'Asharī law applicable in India with variant doctrines should be at all comprehensive—such an object being obviously outside the scope of a book of this nature—it is submitted that certain of the observations made in this respect might have been more adequate in themselves and more accurate. The reference to the views of the Mālikī and Shāfi'ī schools on the subject of marriage-guardianship (pp. 178 *et seq.*) would be more satisfactory if some mention had been made of the fundamental difference from Hanafī doctrine, namely that certain persons only among the entitled guardians possess the power of *Jabr*; and contrary to the statement on p. 92, Malik and the Mālikī school do accept the doctrine of marriage-equality, albeit in a more restricted form than its Hanafī counterpart.

Revision of the text has removed several minor slips and inaccuracies, but a few still remain. There is an obvious arithmetical error in the illustration of a principle of the Shāfi'ī law of pre-emption (p. 290); the explanation of the "*Hasan*" form of *talāq* (p. 129) is at least dubious, and certainly Goldziher's authority cannot be claimed for the designation of the *Shī'a* as a "school" and not a "sect" (p. 36).

Perhaps the least satisfactory result of the revision, however, is the introduction, which the author tells us he almost decided to rewrite in view of the recent work of Schacht (*Origins of Muhammadan Jurisprudence*), which develops a theory of the early history of Islamic law completely different from the traditional view—as presented in Fyzee's first edition. It is to be regretted that the author had second thoughts on the matter and decided simply to revise it, for the result is an unhappy and a rather confusing compromise. The traditional picture remains predominant in the text, but there are references, at times all too vague, to the opposing contentions of Schacht whose main thesis Fyzee regards as "established beyond much doubt," and whose views, he says, we must regard as having superseded such works as that of Agnides. This last statement is strictly inaccurate, for in so far as Agnides gives us the systematic theory of the *'usūl* and Schacht the historical development which led to that theory, the two are complementary not contradictory.

Such criticism as has been offered concerns, almost entirely, aspects of the work which, when the book is viewed as a whole, might be considered of relatively minor importance. The author's chief concern is the exposition of Anglo-Muhammadan law, and as such the book is a model of competence and clarity. It has profited greatly from the addition of some thirty-three recent cases which now bring the case-law down to 1951; and it is to be sincerely hoped that when the much-needed textbooks dealing with the Muhammadan law applicable in other parts of the Muslim world do appear, they will attain the standard set by Mr. Fyzee.

N. J. COULSON.

GROUNDWORK OF NIGERIAN LAW. By T. O. ELIAS. [London: Routledge & Kegan Paul, Ltd. xxx and 374 pp. 30s.]

A BOOK by an African lawyer on the law of his own country is an event to be welcomed with enthusiasm at any time, but the more so when the writer handles his material as effectively as does Dr. T. O. Elias.

The aim which the author has set before himself in this his second book on Nigerian law can best be expressed in his own words as "to present a systematic account of Nigerian law in the form of a textbook." The need for such a work became obvious from his own experience, which taught him that "It ought to be an essential part of the legal education of the would-be Nigerian lawyer to possess some knowledge of the sources, the history of the courts, and the elementary principles of the law which, after all, is what he has to practise subsequently to his "call" to the English Bar. It not infrequently happens that the newly qualified Nigerian lawyer naturally wants to know whether and if so, how far, the English doctrine of judicial precedent applies in Nigeria, what the relation is between English law and customary law, how the courts of the country are organised, and within what limits English and Nigerian ideas of contract, tort, crime, land and personal relations operate. He wants to know, too, about the local administration of the law, the intercourse between the Bench and the Bar and, not least, whither Nigerian law is tending."

In furtherance of these purposes the book is subdivided into four main sections:—

Part I comprises an introductory survey, followed by a chapter on the various sources from which Nigerian law is derived. Here the author explains, *inter alia*, why he has made virtually no attempt to go back before the beginnings of British rule, much though this will be regretted by his readers. It was probably, however, a wise decision.

Part II represents a history of the Nigerian courts, subdivided into a number of successive periods. This section, which represents about one-third of the entire book, is detailed and illuminative, although sometimes (let it be confessed) rather heavy going.

Part III ("Elements of Nigerian Law") promises to be the most valuable and fascinating of all, for it sets out to show just how much English law has in fact been imported, how this law has fared and developed in its new environment, and how far it has been excluded by, combined with, or influenced by Islamic law on the one hand and indigenous customary law on the other. Successive chapters on commercial law, contract, tort, conflict of laws, family law, personal relations and land law include much that is of genuine interest and importance, not least a discussion of a considerable number of Nigerian cases. It is to be regretted, however, that so many of these might equally well have been decided in England or elsewhere—for those cases which may be said to represent a distinctively Nigerian development or application of English law seem to represent a small minority.

Again, one wishes that cases of conflict between the different systems of law applicable within Nigeria could have received somewhat fuller treatment.

In a brief Part IV the author treats "The Law and its Administration," and in the last chapter he makes a number of suggestions regarding the future. Some of these are wholly admirable (*e.g.*, that Nigerian lawyers need some systematic training both in Nigerian customary law and in "English law" as locally applied in addition to the basic requirements for "call" to the English Bar, and that there is an urgent need for more and better law reports and other legal literature in Nigeria), while others are less persuasive (*e.g.*, that the doctrine of judicial precedent should be rigidly applied to customary law—a development which would prematurely stratify that law almost as effectively as would codification).

In general this book is competently and clearly written, although there are a number of passages, and many phrases, which invite criticism or doubt. Dr. Elias is to be congratulated on a wholly admirable conception, which he has carried into effect with a considerable measure of success.

J. N. D. ANDERSON.

WOODFALL'S LAW OF LANDLORD AND TENANT. Twenty-fifth Edition.

By LIONEL A. BLUNDELL, LL.B., of Gray's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1954. clxxvi and 1688 and (index) 78 pp.] Permanent Supplement to Twenty-fifth Edition. By LIONEL A. BLUNDELL and V. G. WELLINGS. [1954. 367 pp. 32s. 6d. net. Main work and Supplement, £7 17s. 6d. net.]

THE new Woodfall—the first edition since 1939—has been long awaited: and now that it has appeared, it is plain that it has been worth waiting for. Mr. Blundell and his assistants, Mr. V. G. Wellings, Mr. Bryan Clauson, Mr. Ashley Bramall, Mr. J. T. Plume and Mr. George Dobry, have done a sound piece of work. The general appearance of the book has been modernised by substituting numbered paragraphs with headings in heavy type for the former marginal notes, and throughout there are signs of a zeal for revision. The difficulties created by the appearance of Landlord and Tenant Act, 1954, and the Housing Repairs and Rents Act, 1954, when the book was far advanced have been skilfully dealt with by producing a *Permanent Supplement*, some 350 pages long, which incorporates these Acts and what remains of the Landlord and Tenant Act, 1927. In general, the work of bringing the book up to date has been well done, and there is much evidence of skilled revision throughout. There are a few omissions, such as *J. F. Perrott and Co. v. Cohen* [1951] 1 K.B. 705 (in which the Court of Appeal applied *Tabor v. Godfrey*, which is duly cited on p. 1111), and *Haviland v. Long* [1952] 2 Q.B. 80; and none should assume that a case is not reported in the Law Reports merely because Woodfall cites some other series. Thus, the *Tideway Case* [1952] Ch. 791 is cited on p. 660 by reference to the T.L.R. report at first instance (with no indication of an appeal), on p. 1018 by reference to the All E.R., and on p. 1255 by reference to the T.L.R. report of the appeal. Again, on p. 1207, there are two unexplained references to security being given under section 213 of the Common Law Procedure Act, 1852; and no help is to be obtained from the references in the table of statutes, nor from the Appendices, which rather surprisingly omit the Act altogether. But these are minor imperfections.

The two new Acts of 1954 emphasise the problem which will have to be met in the next edition. There are now some 2,000 pages of text and appendices, and it seems plain that a single volume—even on the thin paper

of the present edition—can no longer conveniently contain the work. If, then, there must be two volumes, how is the split to be made? At present, all the specialised sections of the subject, such as the Rent Acts, the Agricultural Holdings Act, 1948, and so on, are dealt with under the various general headings—control of rent under rent, the grounds for possession under recovery of possession and so on. (Incidentally, a table of contents which gave more than the bare titles of its twenty-two chapters and seven appendices would be welcome.) One possibility would be to devote one volume to the general law of landlord and tenant, and the other to the various statutory forms of control; and for those dealing with, say, an agricultural holding, there is much to be said for collecting together all the specialised rules relating to that particular type of tenancy. That, however, would lead to another problem. On the various statutory forms of control, the book can hardly claim to be exhaustive; thus proceedings for possession under the Rent Acts occupy only a dozen pages or so (pp. 1245–1257), and although these cite the leading cases, they cannot say the last word on the subject. The segregation of these topics would throw this into relief, and so pose the question whether some further expansion should be undertaken.

Whatever may be the solution of that problem, it is plain that there would be many advantages in having a single volume dealing with the general law of landlord and tenant. In particular, the present cramping pressure on space would be relieved, and there would be some encouragement to cure what is perhaps the greatest defect in Woodfall, namely, its failure to refer to articles and other material in periodicals. Without asserting that the book refers to no periodicals at all, it can be said that a prolonged and extensive use of the book has revealed none. The citation of periodicals makes it possible to deal with many a perplexity with the minimum use of space. If, for example, a case has been criticised in the *Conveyancer*, or an undecided point has been explored in the *Journal of Planning and Property Law*, it is difficult to believe that many of those who buy Woodfall want to be shielded from this knowledge. In recent years, it is true, instruments of research such as *Current Law* have made it easier to collect all the available material on a subject. Yet surely no conscientious editor would deliberately adopt an attitude towards his readers of “I have read many articles on my subject: some of them are useless or misleading: but I am not going to tell you even of the useful ones—you must discover these for yourselves.” To take but a single example, p. 1071 cites *Dickinson v. St. Aubyn* [1944] K.B. 454 on the effect of a covenant to paint “in the last quarter of the said term.” As was pointed out at (1945) 61 L.Q.R. 127, in *Bevan v. Chambers* (1896) 12 T.L.R. 417 (which was not cited) the Court of Appeal had reached the opposite conclusion on almost identical wording. Woodfall gives no hint of this; yet even if all references to periodicals are to be eschewed, might not the fruits of the comment have been gathered, e.g., by appending a modest reference to *Bevan v. Chambers* (of the “but see” type)? It is to be hoped that the next edition will be informed by a more liberal policy in this respect: but in the meantime, the profession has a workmanlike new edition which should satisfy all ordinary demands upon it.

R. E. MEGARRY.

THE LANDLORD AND TENANT ACTS, 1927 AND 1954. By LIONEL A. BLUNDELL and V. G. WELLINGS. [London: Sweet & Maxwell, Ltd. 1954. xvi and 251 pp. (including index). 27s. 6d. net.]

THE Landlord and Tenant Act, 1954, gave statutory effect to most, but not all, of the proposals outlined in the 1953 White Paper “Government Policy on Leasehold Property in England and Wales” (Cmd. 8713). The Act includes some very important changes in the unhappily complicated English

law of landlord and tenant. A residential tenant occupying under a long lease at a low ground rent is now given the protection of the Rent Acts when his lease expires, if the property has an appropriate rateable value, and even if the rent he pays is less than two-thirds of that value. Of more permanent importance are the new provisions (replacing those in the 1927 Act) giving to business tenants security of tenure and the right to compensation for disturbance (which is no longer concerned with goodwill); the amendments to the 1927 Act provisions about compensation for improvements; the extension of the Leasehold Property (Repairs) Act, 1938; and other miscellaneous amendments of the general law of landlord and tenant.

This small, well-produced volume was designed to provide, as soon as possible after the passing of the Act, a reliable explanatory guide to the new law. The authors (who are the editor of the latest Woodfall and one of his assistant editors) have provided, in narrative form, a clear account of the law contained in the Acts of 1927 and 1954. They have not hesitated to express opinions and make suggestions about difficulties of interpretation and application; and, while it is likely that the law reports during the next few years will include discussion of difficulties which have not occurred to the authors of this book, it is interesting to note that the decision in *Diploma Laundry, Ltd. v. Surrey Timber Co., Ltd.* [1955] 3 W.L.R. 404, C.A., is consistent with the view submitted by the authors at p. 25.

The book (like so many others) would be much improved, and much easier to use, if in the reprint of statutes included in one of the appendices marginal notes directed the reader to the principal discussion of each section in the main text.

LEOLIN PRICE.

EVERYMAN HIS OWN LAWYER. Sixty-eighth Edition. By "A BARRISTER." [London: The Technical Press, Ltd. xvi and 914 and (glossary and index) 61 pp. £1 10s.]

THIS is a practical manual; and sixty-eight editions since 1863 indicate that it is both popular and useful.

It consists, in essence, of two portions covering, respectively, substantive law and adjectival law. Substantive law occupies, appropriately, the overwhelming majority of pages; and it is but fair to say that the editor has produced a competent and workmanlike summary of subjects as diverse as copyright, motoring offences and wills. The last edition was published in 1951, and the changes wrought by more than 300 statutes have had to be assimilated. It is to the editor's credit that no signs of indigestion are apparent.

The major blemish in the book lies in its treatment of adjectival law. The reader, by definition a layman, is in the first few pages introduced to a wealth of detail concerning the constitution of the Supreme Court. He is told that the Lord Chancellor presides over the Chancery Division, that the number of puisne judges may vary only between certain limits, and that a Lord Justice of Appeal, if appointed after a day in 1938, may be required to sit as an additional judge of the High Court. What the layman really wants to know is how the thing *works*. A practical approach, distinguishing criminal courts and procedure from civil courts and procedure, and tracing *seriatim* the steps taken in the trial of an action and of a criminal charge, might well replace the existing method.

There are other, minor, criticisms, but the book is certainly well written—particularly the Defamation chapter—and modestly priced for its size.

ALLISTER LONSDALE.

CIVIL LIBERTIES DOCKET. [New York, U.S.A.: National Lawyers' Guild, 40 Exchange Place, New York 5. 29 pp. \$5.00 p.a.]

We are glad to notice the appearance of this docket, which will be published five times each year. It contains a digest of all the cases coming before courts in the U.S.A. in which civil liberties are involved. The first number to be issued runs to twenty-nine pages, and deals with eight cases per page on an average, which gives some indication of the substantial place which civil liberties holds in American jurisprudence. It is hoped in future issues to give references to the significant literature on these issues.

C.

Books and Publications Received

THE ELEMENTS OF INCOME TAX LAW. Second Edition. By C. N. BEATTIE, LL.B. Supplement to July 31, 1955. By J. R. B. PRICE, LL.B. [London: Stevens & Sons, Ltd. 2s. 6d. net.]

GREEN'S DEATH DUTIES. Third Edition. Fourth Cumulative Supplement. By H. W. HEWITT, LL.B. [London: Butterworth & Co. (Publishers), Ltd. 1955. xii and 55 pp. 7s. 6d., by post 4d. extra. Complete work 75s.]

UNDERHILL'S LAW RELATING TO TRUSTS AND TRUSTEES. Tenth Edition. Fifth Cumulative Supplement. By M. M. WELLS, M.A. Containing all developments up to September 1, 1955. [London: Butterworth & Co. (Publishers), Ltd. xix and 40 pp. 7s. 6d., by post 4d. extra. Complete work 77s. 6d.]

ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE. Thirty-third Edition. Sixth Cumulative Supplement, September 1, 1955. By T. R. FITZWALTER BUTLER and MARSTON GARSIA. [London: Sweet & Maxwell, Ltd.]

CLERK AND LINDSELL ON TORTS. Eleventh Edition. Supplement to September 1, 1955. By F. MAURICE DRAKE, M.A. [London: Sweet & Maxwell, Ltd. 4s. 6d.]

ENCYCLOPAEDIA OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. Vol. II. Revision 24—October 15, 1955. Vol. I. Revisions 24 and 25—December 15, 1955.

LEWIN ON TRUSTS. Fifteenth Edition. Third Cumulative Supplement to December 31, 1954. By JOHN C. HARPER, assisted by A. C. WOOLLATT. [London: Sweet & Maxwell, Ltd. 5s.]

INDIAN CRIMINAL DIGEST (1904 TO 1953). Vol. II. [All India Reporter, Ltd., Congress Nagar, Nagpur 1.]

THE LAWYER'S COMPANION AND DIARY, 1956. Editors: ERNEST L. BUCK and LESLIE C. E. TURNER. [London: Stevens & Sons, Ltd. 2164 pp. No. 1: 25s.; No. 2: 21s.]

THE ELEMENTS OF ESTATE DUTY. By C. N. BEATTIE, LL.B. Supplement. viii and 16 pp. 8s. 6d. By post 3d. extra. Combined price, 25s., By post 9d. extra. [London: Butterworth & Co. (Publishers), Ltd. 1955.]